1994

The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African-American Males

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THE DILEMMA OF LEGAL DISCOURSE FOR PUBLIC EDUCATIONAL RESPONSES TO THE "CRISIS" FACING AFRICAN-AMERICAN MALES

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* Professor of Law, Indiana University School of Law. B.S. 1978, Indiana University; J.D. 1982, Yale University. I would like to acknowledge and express my appreciation to many colleagues and other friends whose support and suggestions have been so valuable in this article. Special thanks to Professors Judy Failer, and John Lucaites, and Professor David Smith, Director of the Poynter Center at Indiana University in Bloomington. In addition, I would also like to thank Trevor Brown. An earlier version of this article was presented at the Fifteenth Annual John E. Sullivan Lecture Series held at the Capital University Law School on November 17, 1993. I would like to thank the participants of that conference as well. I would like to especially thank Professor Daniel Kobil who commented on that earlier draft. I would like to thank Margaret Allen, Victor Katz, Tina Speagle and Cheryl Peebles for their exceptional research assistance and Indiana University School of Law for the financial support they provided for this article. I would also like to thank Krystie Herndon for her exceptional secretarial assistance. I would like to dedicate this article to Devin Brown, my (biracial) African-American son. Devin you must understand that it is necessary to live by stories constructed about black males and in a sense these stories are real. Nevertheless, they are still just stories. Throughout your life, live by the positive stories, not the negative ones.

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INTRODUCTION

The purpose of this conference is to discuss the impact of the legal system on African-American males. When a conference focuses on this question, such issues as the disproportionate numbers of African-American males in the criminal or juvenile justice system are invariably raised. Normally, other issues such as employment discrimination or the condition of African-American males in public schools are also discussed. After a healthy discussion of the deplorable statistics related to the condition of black males, such conferences turn inevitably to the primary normative question: "What should we do about this deplorable situation?" If this question is directed toward governmental efforts aimed at improving the situation, then the primary normative question becomes a secondary normative question: "What should government do about this deplorable situation?" In response to this secondary question, some have advocated

establishing separate, publicly-funded African-American male academies, classrooms, or special after-school classes.[1]

Proposals for African-American male public education programs are one logical response to the secondary normative question. There are a number of reasons why respondents to the question would focus on public education. The most obvious reason is the one that brings us together today. That is to respond to the so-called *crisis* affecting black males. This is not, however, the only reason to argue for separate educational programs. Another reason to support such public educational programs for black males could be to more effectively inculcate feelings of loyalty and connection between African-Americans. The objective of this group-directed education is to convince these individuals that their situation is intimately connected to that of all African-Americans. The desired result of such education is that those individuals will want to participate in the collective struggle of African-Americans against racial oppression and domination in American society. Since this struggle is a collective effort by the African-American community, individuals cannot succeed alone. To be black is to be burdened with unchosen duties and obligations to assist this community in its collective struggle. Individual blacks who harm others in the African-American community are, therefore, engaged in especially pernicious behavior.

Another reason would be to address the existence of the cultural conflict between the dominant American culture enshrined in the traditional public educational program and African-American students' culture. Often, the traditional public educational program is seen as alien to the cultural environment of black males. The existence of this cultural conflict could be a significant factor in the substandard performance by African-American males in public schools.[2] Separate public educational programs

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1. *See, e.g.*, Patricia A. Jones, *Educating Black Males—Several Solutions, but No Solution*, CRISIS, Oct. 1991, at 12. Detroit, Chicago, San Diego, Baltimore and the District of Columbia all have school boards that have considered such an idea. Pamela J. Smith, Comment, *All Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2006 (1992); *see also* Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 849-52 (1993).

2. *See, e.g.*, Grimes v. Sobol, 832 F. Supp. 704 (S.D.N.Y. 1993), in which the plaintiffs brought an action alleging that New York used a culturally biased curriculum in its public schools which was systematically biased against African-Americans and therefore violated Section 1983 and the regulations implementing Title VI. For further discussion of *Grimes v. Sobol*, see *infra* notes 57-58 and accompanying text.

could provide the means by which to attenuate this conflict, thus improving the educational performance of black males.

Another reason is underscored by the belief that education should provide individuals with the mental tools to overcome successfully the obstacles life will place in their path. In our dominant culture, African-American males are involuntary inhabitants of a socially constructed racial and gender category that has been imbued with particularly negative connotations. African-American males are often thought to be poor, lazy, lustful, ignorant, and especially prone to aggressive and criminal behavior. Since race and gender are not only immutable characteristics, but are also present when the individual is present, these dominant cultural understandings are always threatening to assert themselves in many social situations encountered by African-American males. Being members of a social category with such negative connotations places African-American males at a consistent disadvantage. Regardless of their intent at the time, they often find themselves in situations where their appearance, actions, and behaviors are interpreted by others to be consistent with our dominant culture's common understandings about them. Separate public educational programs, designed with this understanding in mind, could equip them to address more effectively the ever present difficulties of being a black male in American society.

Proposals for separate public educational programs for black males could be viewed as race and gender motivated decision-making by government officials. Therefore, the justifications for and the structure of these programs must be sensitive to a Fourteenth Amendment equal protection challenge. Thus, answers to the secondary normative question must take into account the following primary legal question: "What legal arguments can be made to legitimize these efforts of public school officials?" Though I have placed both of the normative questions before the primary legal question, there is a dialectical relationship between them. In American society, law is the most powerful mechanism through which normative decisions are implemented and our dominant normative structure is maintained. Society's dominant conceptions of the social world outside the legal arena will influence legal conceptions of the social world, and legal conceptions of the social world influence extra-legal discussions. Discussions regarding programs that will respond to the condition of African-American males, therefore, are often already influenced by legal conceptions, even if the participants in the discussion are not aware of or do not formally acknowledge this influence.

This article is envisioned as both a conceptual archaeological excavation of how contemporary legal discourse analyzes issues directed at

answering the secondary normative question and a brief genealogy of the development of that discourse. By writing this article, I hope to reveal another and more subtle impact of the legal system on the status and condition of African-American males. I will show how the embedded structures of legal discourse will affect the justifications for, and the development of, public educational programs that can provide assistance to black males. It is unlikely that public schools will be able to set up programs limited to only black males. Such programs will have to be part of a broader array of programs.

Part I explicates what I mean by structures of legal discourse and introduces the two legal frameworks employed in analyzing issues of race or gender and public education, the individualist and the traditional. In Part II, I explain the embedded understandings and the historical development of the individualist framework. The basic conceptual idea of this framework views society as a collection of knowing individuals. This framework can be applied to the legal analysis of either racial or gender issues. In Part III, I discuss the embedded understandings and the historical developments of the traditional framework. The fundamental conceptual idea of this framework views society as a collection of knowing individuals *and* substandard groups. African-Americans are considered to be such a group. With regard to African-American males, we have an anomalous situation. The Supreme Court has never developed an understanding of males as *less than* females. The traditional framework is, therefore, inapplicable to an analysis of public educational programs legally conceptualized as benefiting only males. Hence, the traditional framework applies only because the benefited males are also black. In Part IV, I contrast the arguments for programs that can also assist black males in the individualist framework and the traditional framework. I conclude the article by explicating the dilemma that proponents of programs to assist black males face within each of these two frameworks.

I. LEGAL DISCOURSE AND THE INTERSECTION OF RACE, GENDER AND PUBLIC EDUCATION

As humans, we possess a reflective awareness which uses words and language to identify, compare, analyze, and relate events so that they come to us with a certain understanding and meaning and not as brute facts.[3] The phenomena that force themselves into our consciousness must be interpreted in order to make sense out of them. These interpretations,

3. *See, e.g.*, H. RICHARD NIEBUHR, THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN MORAL PHILOSOPHY 61 (1963).

however, are not of separate and distinct items. Rather, each piece is a part of a web that is present in its whole, even if we only focus upon one part of the web at any given time.[4] Hence, what we notice and how we come to understand what we notice is both shaped and constrained by these larger patterns of interpretation.[5] These larger patterns of understanding allow us to place a given event into a "proper" understanding.[6]

The process of resolving legal disputes is also a process in which phenomena is interpreted and a meaning is placed on those interpretations. Our legal system consists of rules structured around various conceptions of the social world.[7] These conceptions are validated because the legal system dictates the kinds of arguments that are persuasive for resolving legal disputes. When one engages in legal discourse, one is engaged in a process of conceptualizing and articulating phenomena in a way that respects the larger patterns of understanding which our legal system employs.

For any given dispute, legal conceptions and legal arguments are not developed on a clean slate. They are developed against the backdrop of prior legal history. This prior history is impressed into any given dispute in the form of stare decisis which is always prevalent in shaping and structuring legal arguments and conceptualizations. Prior cases, especially those decided by the United States Supreme Court, provide the basis for current legal analysis. It is through stare decisis that the legal past exerts its tremendous influence on the present. In order to appreciate the predicament which confronts the secondary normative question, it is necessary to examine how the Supreme Court has historically constructed and dealt with issues of gender, race, education, and the Equal Protection Clause. This will allow us to not view legal disputes concerning governmental programs that assist African-American males in isolation, but instead to see them as part of a larger pattern of implicit understanding that is always shaping and structuring how we comprehend this current issue.

Equal protection analysis generally analyzes the intersection of race and gender as separate and distinct issues.[8] Such issues are generally

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4. *See generally* CHARLES TAYLOR, HUMAN AGENCY AND LANGUAGE, PHILOSOPHICAL PAPERS 234 (1985).

5. Susan H. Williams, *Feminist Legal Epistemology,* 8 BERKELEY WOMEN'S L.J. 63, 68-69 (1993).

6. *See, e.g.,* NIEBUHR, *supra* note 3, at 62.

7. *See generally* Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 STAN. L. REV. 169 (1968).

8. For an attempt to treat issues of discrimination against African-American women distinct from analysis of gender or race, see Richard Cummings, *All-Male Black*

(*continued*)

viewed as either racial issues or gender issues but not as a hybrid that calls for a completely new analysis.[9] In *Mississippi University for Women v. Hogan*,[10] the Supreme Court used a middle level scrutiny test to determine if a male was being discriminated against by a female-only nursing program publicly funded by the state of Mississippi.[11] This can be contrasted with *City of Richmond v. J.A. Croson Co.*,[12] where a majority of the Supreme Court held that strict scrutiny applies to racial classifications by governmental entities regardless of the presumed beneficiaries.[13]

Schools: Equal Protection, the New Separatism and Brown v. Board of Education, 20 HASTINGS CONST. L.Q. 725, 738-40 (1993).

9. *See, e.g.*, Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991) (addressing separate schools for black males as an issue about gender and ignoring the racial implications). For further discussion, see *infra* notes 199-205 and accompanying text. A number of cases have addressed this issue in the context of Title VII lawsuits. *See* DeGraffenreid v. General Motors, 558 F.2d 480 (8th Cir. 1977) (refusing to recognize rights of women of color as separate from a gender or racial analysis); Robinson v. Adams, 830 F.2d 128 (9th Cir. 1987) (refusing to recognize a Title VII claim of discrimination based on race and sex by a black male); Jefferies v. Harris County Community Ass'n, 615 F.2d 1025 (5th Cir. 1980) and Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (recognizing black females as a distinctly protected subgroup under Title VII).

10. 458 U.S. 718 (1982).

11. Recently, the Supreme Court ruled that the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994).

12. 488 U.S. 469 (1989).

13. In *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the Supreme Court addressed a congressional redistricting map drawn by the State of North Carolina. North Carolina's map had been drawn in such an order as to create two predominantly black congressional districts. As a result, North Carolina elected two black Congresspersons; the first African-Americans elected to Congress from North Carolina since Reconstruction. According to the majority, the only way to explain the rather odd shaped boundary lines was that their drawing was motivated solely by racial considerations. *Id.* at 2828.

Since African-Americans constituted 20% of the population of North Carolina, two black Congresspersons out of 12 could not be considered racially disproportionate. As a result, the substantive effect of the redistricting plan did not grant African-Americans a disproportionate amount of representatives. The Court nevertheless struck down the redistricting map, because the map could not be rationally understood as anything other than an effort to separate voters into different districts on the basis of race and the separation lacked sufficient justification. *Id.* What is particularly disturbing about *Shaw v. Reno,* is that it suggests that strict scrutiny will apply even in situations where there can be no one who is presumed to be harmed by such racially motivated decision-making. It appears as if the Court is saying that the racially motivated decision-making, regardless of any substantive harm to any person, is the violation.

Irrespective of the particular legal test applied to race or gender, either middle level or strict scrutiny, the test applied will obscure the underlying, inconsistent cognitive frameworks developed by the Supreme Court for analyzing equal protection issues addressing race and public education.

Constitutional analysis regarding issues of race and education has developed into a dual discourse. Specifically, the equal protection analysis used by the Supreme Court in the area of race and education has drawn upon two different systems of ideas. These cognitive frameworks, the individualist framework and the traditional framework, are the result of constitutional and historical developments. Each uses different embedded understandings to image racial phenomena. They have different views of African-Americans and their role and place in American society. Each framework has its own separate and distinct implications and limits for structuring and providing legal arguments for public educational programs that can also assist black males. These implications and limits are conceptual because they reside in the basic assumptions upon which the frameworks rest. As a consequence, these frameworks both structure and limit the legal disputes regarding these public educational programs by making only specific kinds of arguments persuasive.[14]

Since the issue that we are focusing upon is public educational programs that can also assist African-American males, we have an intersection of the categories of race and gender. The legal analysis of the individualist framework can be applied to discrimination based on race or gender. The Supreme Court, however, has never developed an understanding of males as less than females. The traditional framework, therefore, is inapplicable when analyzing public educational programs legally conceptualized as benefiting only males. The traditional framework is applicable only because the males being focused upon are also black. My discussion of the traditional framework, therefore, will be limited to race. This also means that when addressing these programs for black males, the traditional framework developed in the context of race will be masquerading as a gender-based analysis. Accordingly, the traditional justifications given for black male programs will also have implications for black females.

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14. They do not provide for radical shifts in the understanding of racial issues, but rather work to constrain the understanding of racial phenomena. It is, of course, true that radical shifts can and do occur in constitutional analysis of racial phenomena, but in most given instances sufficient information cannot come into play that will create a paradigm shift.

I should also note that the analysis of educational programs that could benefit African-American males will not be as precise as I suggest. This is because both of these frameworks, the individualist and traditional, will be present whenever legal arguments regarding public educational programs that can assist black males are being made. Hence, the two alternative visions will parade under the banner of one incoherent analysis applying the heightened scrutiny required by the Equal Protection Clause for race or gender discrimination, rather than the two separate and distinct alternative interpretations presented in this article.

II. THE INDIVIDUALIST FRAMEWORK

One of the conceptual frameworks that the Supreme Court has used to analyze issues involving race or gender and public education is the individualist framework. The underlying premise of this framework is the concept of society as a collection of knowing individuals. This framework did not spring into existence over night. It was developed by the Supreme Court over a number of years, primarily through its opinions in the area of race and public education.

A. *Conceptual Structure*

1. *View of the knowing individual*

The individualist framework is the primary framework the Supreme Court currently employs when applying the Equal Protection Clause to resolve gender and racial issues in public education. The vision of society implicit in many of the Supreme Court's more recent Equal Protection Clause cases starts with the basic premise that the social world is a collection of knowing individuals.[15] The historical development of the concept of the knowing individual in Anglo-American societies that appears to be incorporated into our understanding of the Equal Protection Clause was the result of hundreds of years of intellectual development. The concept of the "knowing individual" is based around the idea of individual self-determination. Contemporary American society, perhaps more so than any other society in human history, believes that the primary goal of life is for the individual to live in harmony with its essential self. Thus, any given individual should seek to uncover the essential self, decipher its

15. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Metro Broadcasting v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting); Shaw v. Reno, 113 S. Ct. 2816 (1993).

truth, separate it from that which might obscure or alienate it, and then structure the remaining aspects of one's life so that they are in harmony with it. This essential self is unique for any given individual. Our conception of the essential self is that it is a created, hidden, piece of individual uniqueness. The presupposition of much of mainstream American culture and hence, the journey of a lifetime that occupies us on an emotional, psychological and psychoanalytic level, is the search embodied in the attempt to comprehend and then to live in harmony with the unique and hidden part of who we truly are.

The concept of the essential self requires that we see knowing individuals as self-directed, coherent, free willed, integrated, and rational.[16] Because of the essential self, individuals are seen as capable of being free from acculturation, tradition, obligation, or commitment.[17] At least in principle, knowing individuals can be viewed as independent of their aims and attachments. Thus, they have the ability to stand back and assess and revise those aims and attachments.[18] Since knowing individuals are presumed to have this capacity, their attitudes, opinions, and beliefs are not seen as products of the various cultural systems of meaning resulting from socialization. On the contrary, these knowing individuals choose their beliefs freely and are seen as the author of their own thoughts, the captains of their respective ships, the ruler of their respective empires, and the stewards of their behavior. The effect of their behavior is viewed as controlled by their own intent.

2. *Emancipatory role of this framework*

One of the primary historical motivations for the development of the concept of the knowing individual was the desire to emancipate the individual from religious and feudal obligations and loyalties that were the result of ascription and historical tradition.[19] In order for the individual to

16. *See, e.g.*, Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 181 (1990); Seyla Benhabib, *Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory*, 11 CARDOZO L. REV. 1435 (1990).

17. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 152 (1985); *see also* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1-8 (1982).

18. Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice*, 1989 UTAH L. REV. 597, 598.

19. This concept of the social world is one of the fundamental presuppositions of the predominant world view in contemporary Western society. BARBARA SENKOWSKI STENGEL, JUST EDUCATION: THE RIGHT TO EDUCATION IN CONTEXT AND CONVERSATION 101 (1991).

be self-determining, it was necessary to detach the individual from the dead-hand grip of the past represented by Europe's religious and feudal traditions.

This emancipatory concept took on particular importance in a society like the United States which is a land composed predominately of immigrants. Immigration to the United States was the largest single migration in human history. Between 1821 and 1924, total immigration exceeded thirty-three million people who came primarily from Europe.[20] As a result, America was founded as a country of immigrants who came with different ethnic languages, cultures and heritages. The emancipatory conception of the knowing individual in America, therefore, served also as a means to reduce the sense of ethnic group identity for European immigrants. By reducing the sense of ethnic identity, the possibility of the destructive ethnic conflict so often seen in Europe was largely avoided in America.

In 1954, the collective history of racial relations in North America had spanned over 330 years. Except for a period of Reconstruction after the Civil War, African-Americans had gone through primarily two major social epics—slavery and legally enforced and sanctioned segregation. America's history of race relations was the almost uninterrupted use of race as a means to classify, constrain, and bind people of African descent. Therefore, African-Americans were both imprisoned and joined together by our society's dominant and historically developed cultural traditions related to race. The Supreme Court's opinion in *Brown v. Board of Education*[21] was also motivated by a desire to emancipate African-Americans from historical traditions that had constrained and bound them in this society.

The conception of knowing individuals has definite implications for resolving issues that involve race and gender. Since the goal of life is to live in harmony with the essential self, this framework respects the ability of the individual to be self-determining. It abhors attempts to constrain individuals by classifying them based upon characteristics they do not choose. Immutable characteristics of individuals are not matters of choice, and thus are counter to the ability of an individual to be self-determining. No concept could be more detrimental to the self-determination of knowing individuals. The emancipatory function of this framework seeks to free the individual from both the positive and negative connotations associated with

20. ROGER DANIELS, COMING TO AMERICA 124 (1990). Thirty-three million Europeans immigrated to the United States between 1821 and 1924. *Id.* at 23.

21. 347 U.S. 483 (1954).

being ascribed to a particular racial and/or gender group. The individual is to be freed from both the subordinating aspects of possessing an unchosen trait and the unchosen obligations that are a product of being ascribed to a community of people.

The proper resolution of racial and gender matters is to transcend their consideration in order to free the individual from the historically developed traditions that prevent them from being self-determining. Being freed from historically developed traditions, however, does not prevent individuals from choosing to associate themselves with their racial and/or gender group. Such a choice has to be allowed in order for individuals to be self-determining. It is only when the association is compelled that it violates the knowing individual's ability to be self-determining.

3. *Role of government*

The individualist framework also has a limited conception of the role of government. The roots of American liberalism can be traced to 17th century England.[22] There, primarily with the writings of John Locke, a philosophical defense of individual rights was developed that was not rooted in classical or biblical sources. The essence of Locke's philosophy is to prioritize the rights of the individual before the rights of society. Society "comes into existence only through the voluntary contract of individuals trying to maximize their own self-interest."[23] As a result, society and government are there to protect the rights of individuals.

Since government comes into existence to protect the rights of these knowing individuals, its role is dictated by that function. The individualist framework, therefore, requires that government be neutral on the question of the good life and respect equally every knowing individual's pursuit of their own various objectives. Government must both respect the individuality of its citizens and mediate their conduct. This requires that government engage in a balancing act where it allows individuals to pursue their own desires, yet constrains individual choice so that they do not unjustly interfere with the rights of others to do the same. By doing this, government allows individuals to choose their own goals and ends, while allowing simultaneously a similar liberty for others.[24]

This conceptual structure has implications for how government ought to structure its public educational programs. Children do not fit the

22. For a discussion of American individualism, see generally BELLAH ET AL., *supra* note 17.

23. *Id.* at 143.

24. *See, e.g.*, Sandel, *supra* note 18, at 598.

individualist framework's ontological premise of knowing individuals. While adults are seen as choosers, children are seen as learners. The role of public education is to convert learners into choosers—knowing individuals. Since public education is still a government function, however, this process must be conducted within the constraints of neutrality imposed on government.[25] Public education, therefore, must treat people as individuals and not advance the parochial interest of a given group.[26]

B. *The Constitutional Historical Development*

The individualist framework developed piecemeal over a very long period of time as part of a historical process.[27] Since the Supreme Court's

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25. The requirement of governmental neutrality suggests an implicit model of public education. This implicit model views the function of public education as converting learners into knowing individuals. Public education must therefore perform two conflicting functions. Education must perform a uniquely individualistic function geared towards promoting the capacity of individuals to decide for themselves what their plans or purposes should be and how to pursue them. This academic function is value neutral, because it is directed towards increasing the capacity of children to choose. Education must also perform a limiting function for society. This limiting function inculcates values that restrict the desirability of certain choices individuals might make. This societal function is also value neutral, but in a different way. The value neutrality here is predicated upon instilling values into children—such as self-sufficiency, self-reliance, belief in equality, tolerance for political and religious diversity and respect for formal authority—that will allow others to pursue their desires without undue interference. For a more in-depth discussion of this, see Brown, *supra* note 1, at 858-67.

26. *But see* Ronald Dworkin, *Are Quotas Unfair?, in* RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY 175-89 (Russell Nieli ed., 1991). Dworkin gives a definition of liberalism in which it is an ultimate goal, but not the conception of society that should be recognized now. As a consequence, taking account of race should be allowed if it serves to reduce the amount of racial consciousness that currently exists in our society. In the long run, affirmative action programs in higher education serve to do this by increasing the number of blacks who are at work in the professions. It will reduce race consciousness, because it will reduce the sense of frustration, injustice and racial self-consciousness in the black community to the point that blacks can think of themselves as individuals. In addition, professional association of blacks with whites will decrease the degree to which whites think of blacks as a race rather than as people.

27. "Individualism was . . . embedded in the civic and religious structures of colonial life . . . ." BELLAH ET AL., *supra* note 17, at 147. The term, however, was not given a name until Tocqueville used "individualism" to describe the restless American quest for material betterment. *Id.* Application of the liberal tradition to blacks in American society can be traced to its antecedent found in religious leaders who formally advocated an individualistic conception of society under God over 100 years before the American Revolutionary War. For example, Cotton Mather—the symbol of authoritarian

(*continued*)

1971 opinion in *Reed v. Reed*,[28] a heightened scrutiny analysis has been applied to gender discrimination. When we consider, however, that the Fourteenth Amendment was passed after the Civil War, it is not surprising that the primary application and development of the Equal Protection Clause has been to racial discrimination. As a result, race has historically served as the paradigm for Equal Protection Clause analysis.[29] Most of the following discussion, therefore, will focus upon the Supreme Court's public education cases developing the individualist framework in the context of race. In *Mississippi University for Women v. Hogan*,[30] however, the Supreme Court made it clear that the individualist framework also applies to the analysis of gender discrimination in public education.

Since the original Constitution protected slavery, the recognition that African-Americans could be viewed, at least in part, as knowing individuals did not occur until the end of the Civil War and the passage of the reconstruction amendments—the Thirteenth, Fourteenth and Fifteenth Amendments.[31] Much of the potential of those Amendments to define the concept of knowing individual to include blacks, however, was checked by narrow judicial interpretations in the last decades of the 19th century.[32]

The modern idea of expanding the individualist framework to encompass blacks within the definition of knowing individuals can be traced back to the famous dissent by Justice Harlan in *Plessy v. Ferguson*.[33] As Justice Harlan argued:

> [I]n view of the Constitution, . . . there is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . . The law regards man as man . . . and takes no account . . . of his color

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Puritanism—asserted the equality of slaves in the sight of God. KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 45 (1989). Richard Baxter, another English Puritan, told slaveholders in 1673 that slaves are as good a kind as you and even though their sins have enslaved them to you, remember that they have immortal souls and are just as capable of salvation as you are. *Id.*

28. 404 U.S. 71 (1971).

29. Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979).

30. 458 U.S. 718 (1982).

31. Shortly after the American Revolution, Massachusetts adopted the notion of equality before the law and wrote it into its state constitution. ANDREW KULL, THE COLOR-BLIND CONSTITUTION 2 (1992).

32. For a discussion of some of these cases, see *infra* notes 168-78 and accompanying text.

33. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). While Justice Harlan's opinion was certainly more in favor of the notion of equality than the majority, it was not a declaration of equality either.

> when the civil rights as guaranteed by the supreme law of the land are involved.[34]

Justice Harlan's opinion echoed the fundamental conceptual premise of the individualist framework that individuals should be allowed to pursue their own independently determined desires. For him, one of the main problems with the Louisiana segregation statute was that it interfered with the personal freedom of citizens. The statute eliminated the ability of a white man and a black man to choose to occupy the same public conveyance on a public highway.[35] By preventing such, the government was infringing upon the personal liberty of a person to make such a choice.[36]

1. Brown v. Board of Education

Between 1938 and 1950, the Supreme Court addressed four cases dealing with segregation in graduate and professional schools.[37] The seminal case in the expansion of the concept of knowing individuals to include African-Americans, however, was *Brown v. Board of Education*.[38] Because of the complexity of a case like *Brown I* and the American society that existed in 1954 for which it was written, classifying it is generally dependent upon the aspects of *Brown I* that are highlighted for discussion. *Brown I* can be conceptualized within both the individualist framework and the traditional framework.[39] In this section, I will articulate the meaning of *Brown I* within the individualist framework and postpone the conceptualization of it within the traditional framework until later.[40]

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34. *Id.* at 559.

35. *Id.* at 556.

36. Portions of Justice Harlan's opinion make it very clear that he did not view African-Americans as the equal of whites. *Id.* at 552-64. Even though Justice Harlan's opinion was not a model liberal opinion overall, he was willing to go further than his fellow brethren at the time and arguably abolish the distinction between political and civil rights and social rights.

37. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

38. Brown v. Board of Educ., 347 U.S. 483 (1954). For purposes of this article, this case will be referred to as *Brown I*.

39. These two options do not exhaust the possible conceptions of *Brown I*. As a number of scholars have pointed out in the past, *Brown I* could also be seen as an anti-subordination case. For a recent example of this in public education, see Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994).

40. *See infra* part III.

In *Brown I*, the Supreme Court struck down state and local statutes that segregated students in public elementary and secondary schools, even though the schools' physical facilities and other tangible factors were equal.[41] The harm of *de jure* segregation within the individualist framework can be seen as one of three different violations of governmental neutrality. First, public schools were not treating students, teachers, and administrators as individuals but rather as members of a group. Hence, the individuals, especially if they were black, were being confined and segregated not based upon matters of choice but upon accidents of birth. In effect, the government was imprisoning individuals within racial traditions and not providing protection to allow them to be self-determining. Second, despite the Supreme Court's assertion of equality regarding physical facilities and other tangible factors, white students were provided with better equipped and funded schools than their black counterparts. As a result, the track record of segregated public schools was that the state would advance the parochial interest of only whites when left to its own devises. Finally, segregation was stigmatizing to African-Americans because the government was conveying the message that African-Americans were not the equals of whites through segregation and underfunded black schools. The dissemination of this stigmatic message was also a violation of the constraints of neutrality.

Within the individualist framework, the remedy for these harms is for government to stop violating the constraints of neutrality.[42] Under the individualist tradition, there is a critical distinction to be made between individuals voluntarily choosing to separate themselves along racial and ethnic lines from situations where government forces them to do so.[43] As long as public schools use race neutral methods, such as freedom of choice plans or neighborhood attendance policies, to determine school attendance and school personnel at equally funded and staffed schools, then public schools are respecting the requirement of governmental neutrality. Consequently, within the individualist tradition, striking down segregation

41. *Brown I*, 347 U.S. at 492.

42. In another article, I have supplied an argument that would have justified school desegregation as a remedy for *de jure* segregation within the liberal tradition. *See* Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1112-40 (1990). However, this was not the rationale for school desegregation articulated by the Supreme Court.

43. Pamela J. Smith, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2009 (1992).

statutes is completely different from ordering public school officials to take account of race in order to ensure integrated student bodies.[44]

Many southern federal judges and school officials implementing the Court's opinions in *Brown I* and *Brown II*[45] interpreted the Court's opinions as being within the individualist framework. Those courts and school officials relied upon wording in *Briggs v. Elliot*[46] to fill the vacuum left by the Supreme Court. In addressing on remand one of the companion cases of *Brown I*, the three-judge federal district court panel in South Carolina wrote the following:

> [The Supreme Court] has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . *The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.*[47]

When I focus on the traditional framework, I will examine *Green v. New Kent County*.[48] In *Green*, the Court definitively moves from a possible non-discrimination interpretation of *Brown I* to a forced integration interpretation.

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44. One of the provisions included in the Civil Rights Act of 1964 prohibited the distribution of federal financial assistance to programs or activities engaged in discrimination. The Department of Health, Education and Welfare issued regulations addressing racial discrimination in federally aided school systems as directed by 42 U.S.C. § 2000d-1 (1988). In addition, the Department's Office of Education established standards for eligibility for federal funds of school systems in the process of desegregation. 45 C.F.R. §§ 80.1-80.13, 181.1-181.76 (1967). "Freedom of choice" plans were seen as acceptable under these regulations. *See* Green v. County Sch. Bd., 391 U.S. 430, 433-34 & n.2 (1968); *see also* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 53 (1976).

45. Brown v. Board of Educ., 349 U.S. 294 (1955). For the purposes of this article, this case will be referred to as *Brown II*.

46. 132 F. Supp. 776 (E.D.S.C. 1955).

47. *Id.* at 777 (emphasis added).

48. 391 U.S. 430 (1968); *see infra* notes 181-87 and accompanying text.

2. Keyes v. School District No. 1—*The acceptance of governmental intent as the equal protection violation*

Another major case in the development of the individualist framework for analysis of issues of race and public education was *Keyes v. School District No. 1*.[49] Until 1973, the Court had only addressed segregation of public elementary and secondary schools in states where the schools were segregated pursuant to state statutory authority as of 1954. In *Keyes*, the Court for the first time addressed a school system where the segregation was not traceable to such a state statute. Hence, the Court had to address the issue of when, in the absence of such a state statute, segregation violated the Equal Protection Clause.

The district court in *Keyes* used *de facto* segregation to find the constitutional violation; the Supreme Court, however, rejected this method.[50] The Court noted that what is or is not an unconstitutionally segregated school will necessarily depend upon the facts of each particular case.[51] *De jure* segregation, and not *de facto* segregation, violated the Constitution.[52] The distinction between *de jure* and *de facto* segregation is

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49. 413 U.S. 189 (1973).

50. The district court found that *de jure* segregation existed with respect to the segregation of schools in the Park Hill area of Denver. The district court also held that the finding of intentional segregation in Park Hill was not in any sense material to the question of segregative intent in other areas of the city. The district court, therefore, concluded that the petitioner's evidence of intentional discriminatory school board action in areas of the school district other than Park Hill was insufficient to "dictate the conclusion that this is *de jure* segregation which calls for an all-out effort to desegregate. It is more like *de facto* segregation, with respect to which the rule is that the court cannot order desegregation in order to provide a better balance." Keyes v. School Dist. No. 1 313 F. Supp. 61, 73 (D.C. Colo. 1970). Nevertheless, the district court went on to hold that the proofs established that segregated core city schools were educationally inferior to the predominantly white schools in other parts of the district—that is, "separate facilities . . . unequal in the quality of education provided." *Id.* at 83. The district court went on to conclude that under the doctrine of separate but equal established in Plessy v. Ferguson, 163 U.S. 537 (1896), the respondent school board constitutionally "must at a minimum . . . offer an equal educational opportunity." *Id.* The court noted that the only feasible and constitutionally acceptable program to furnish such an equal educational opportunity was a system of desegregation and integration which provides compensatory education in an integrated environment. *Id.* at 90, 96.

51. *Keyes*, 413 U.S. at 196.

52. For a description of the racial climate leading up to the litigation in Denver, see J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 195-98 (1979); *see also* James J. Fishman & Lawrence Strauss, *Endless Journey: Integration and the Provision of Equal Educational Opportunity in Denver's Public Schools: A Study of* Keyes v. School District No. 1, *in* JUSTICE AND

(*continued*)

that *de jure* segregation is a "current condition of segregation resulting from intentional state action directed specifically to [segregate schools]."[53] According to the Court, only segregation that is the result of intentional governmental conduct violates the Equal Protection Clause.[54]

I need to elaborate upon two important points. First, the individualist framework dictates that racial separation that is the result of voluntary choice of individuals must be distinguished from segregation that is produced by governmental conduct. If individuals voluntarily choose to separate themselves, even along racial lines, they are following their own desires and are, therefore, being self determining. If segregation, however, is the result of governmental influence, then it is in violation of governmental neutrality. This kind of segregation is not the product of the voluntary choice of individuals. If the Court had chosen to use *de facto* segregation to determine when racial separation violated the Constitution, it would not have been leaving room for individuals to choose to separate themselves along racial lines. Such a position would have put *Keyes* outside the boundaries of the individualist framework.[55]

SCHOOL SYSTEMS: THE ROLE OF THE COURTS IN EDUCATION LITIGATION 185-89 (Barbara Flicker ed., 1990). At least one commentator has argued that the actions of the Denver School Board could not have constituted intentional segregation. *See* Mark G. Yudof, *Nondiscrimination and Beyond: The Search for Principle in Supreme Court Desegregation Decisions*, *in* SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 97 (Walter G. Stephan & Joe R. Feagin eds., 1980). *But see* Fishman & Strauss, *supra*, at 189-200, for a discussion of how the Denver School Board resisted efforts to desegregate the school after the determination of liability for segregation. *See also* Keyes v. School Dist. No.1, 609 F. Supp. 1491, 1519-20 (D. Colo. 1985) (chastising the school board for its uncooperative behavior during the desegregation process), *aff'd*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 951 (1991).

53. *Keyes*, 413 U.S. at 205-06.

54. Woodward and Armstrong present the Justices private deliberations about *Keyes* as regarding the limitations of desegregation remedies. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 260-68 (1979). While the Court in *Keyes* rejected *de facto* segregation as the basis of the constitutional harm, they also adopted a procedural rule that made proving *de jure* segregation easier. *Keyes*, 413 U.S. at 208. If plaintiffs establish intentional segregation in a portion of the school system, the Court will presume that unlawful segregation existed throughout the school system. *Id.* This presumption alleviates plaintiffs' enormous burden of attempting to prove unlawful segregation for each school in the system in order to establish a system-wide remedy.

55. Since this article is addressing the secondary normative question, it is limited to situations where public school officials believe that some public educational programs to assist black males should be implemented. The issue of whether others by filing equal protection lawsuits can force public school officials to act on behalf of African-American males is outside the scope of this article. Nevertheless, *Keyes* and its subsequent

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The second important point to elaborate upon is how the Court treats the government in terms of determining when it violates the Constitution. What the Court does in *Keyes* is to view the issue of government discrimination in the way that it would do so for knowing individuals. Government is presumed to be a knowing individual. Thus, its actions are also presumed to be controlled by its intent.[56] Like individuals, government is capable of acting for many different reasons. Government acting with proper motives may adversely effect minorities. It is not adverse impact, however, that triggers an equal protection violation. Governmental actions only constitute discrimination within the Equal Protection Clause when they are motivated by justifications that violate the constraints of neutrality.

This point can be illustrated by examining the opinion of the federal district court in the case of *Grimes v. Sobol*.[57] In *Grimes*, the plaintiffs brought an action alleging that the New York City public schools used a culturally biased curriculum which violated the Equal Protection Clause. The district court, in an opinion authored by Judge Kimba Wood, seemed willing to concede that the curriculum in New York City's public schools was culturally biased and hence harmful to minorities including African-Americans. Judge Wood noted, however, that in analyzing this issue for the purpose of an equal protection violation, it is not the effect of the curriculum that is determinative. Rather, the plaintiffs must allege that the adoption of the curriculum was motivated because of and not in spite of its

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ratification by the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), make it clear that a violation of the Equal Protection Clause has been defined within the individualist framework and, therefore, only occurs when government has engaged in intentional discrimatory conduct. Courts can order that government take the necessary steps to remedy the effects of discrimination in order to reestablish governmental neutrality. The individualist framework, therefore, does provide a mechanism in which corrective actions can be taken to remedy specific and identifiable violations of governmental neutrality. This is going to be of limited assistance, however, to those who wish to compel public school officials to institute programs solely for the benefit of African-Americans males.

The first hurdle will be to establish that public schools are discriminating against black males. It is not the negative effects of educational practices and policies on black males which will constitute discrimination. Rather, those policies or practices challenged must have been motivated by discriminatory purpose. Secondly, the remedy will normally not be to provide separate programs for black males, but for the public schools to adopt measures that correct the discriminatory practices and thus restore governmental neutrality.

56. *See Keyes*, 413 U.S. at 205-06.

57. 832 F. Supp. 704 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2d Cir. 1994).

detrimental effect on African-American students.[58] Discriminatory purpose cannot be inferred from the state's awareness of the detrimental effects or consequences of its culturally biased curriculum content, or its conscious refusal to adopt Afrocentric educational initiatives.

Since the individualist framework treats government as an individual, it views its actions as motivated by its intent. Consistent with the individualist framework, Judge Wood noted that despite the existence of harm to African-American students, governmental action only violates the Equal Protection Clause when it is motivated by discriminatory intent. The curriculum employed in the New York City public schools was adopted because of legitimate pedagogical considerations. Thus, its adoption was not motivated by discriminatory intent. As a result, the negative impact of such a curriculum on black students is an unfortunate consequence of racially neutral governmental action.

It is also important to note that the individualist framework used by Judge Wood cannot adequately address the assertion that the curriculum employed by the New York public schools is culturally biased. The concept of cultural bias views attitudes, beliefs, and opinions of individuals as products of socialization rather than individual realization. Hence, to see the concept of cultural bias on its own terms requires us to focus on a cultural system of meaning that individuals come to know through the process of socialization. To view the individual's attitudes as products of culture requires us to reject the ontological premise of the knowing individual upon which the individualist framework is based.

Judge Wood quickly forces the concept of cultural bias into the conceptual understandings of the individualist framework. The concept of cultural bias is then reinterpreted. It must be understood as either an effect of racially neutral governmental decision-making or the product of intentional discrimination. If it is understood as an effect of the former, then it is not discrimination. If it is understood as a product of the latter, then it is a violation of the Equal Protection Clause. Thus, a conceptual limit of the individualist framework is exposed. There is no way within this framework to come to grips with the concept of cultural bias given the premises upon which cultural bias is based. Such a concept has to be reconceptualized and is, therefore, misunderstood within the limits of understanding that are embedded in the individualist framework.[59]

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58. *Id.* at 708.

59. It is true that some federal district courts in their school desegregation decrees ordered public schools to take some measures in order to correct cultural bias. *See, e.g.*, Evans v. Buchanan, 447 F. Supp. 982, 1014-16 (D. Del. 1978), *aff'd*, 582 F.2d 750 (3d

(*continued*)

3. Bakke—*Individualism encompasses everyone*

The Court's opinion in *Regents of the University of California v. Bakke*[60] represents another important development of the individualist framework in the area of race and public education.[61] For years prior to *Bakke,* the Supreme Court seemed to be on the side of the lowly, the despised, and the dispossessed.[62] It was thought that the Constitution might be there to protect those who could not protect themselves.[63] As the argument would go, the purpose of the Equal Protection Clause was not to protect the rights of individuals, but to protect discrete and insular minorities from the ravages of the majoritarian political process. If the Court was not addressing a governmental program that discriminated against such minorities, then strict scrutiny was not required.[64] When Allan Bakke presented his claim to the Supreme Court, however, the Court was

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Cir. 1978), *cert. denied*, 446 U.S. 923 (1980); Berry v. School Dist., 515 F. Supp. 344, 373-74 (W.D. Mich. 1981), *aff'd*, 698 F.2d 813 (6th Cir. 1983), *cert. denied*, 464 U.S. 892 (1983). The context of the finding of cultural bias, however, was in cases where the courts had already found intentional discriminatory conduct by the school officials. Consistent with the individualist framework, these courts ordered public schools to eliminate such bias in order to reestablish governmental neutrality. Cultural bias in the curriculum was considered a part of the effect of the intentional discriminatory conduct that led to the original court involvement.

60. 438 U.S. 265 (1978).

61. Certainly an argument can be made that public elementary and secondary schools should not be treated the same as public colleges and universities. There are two issues that distinguish public elementary and secondary schools from public colleges and universities. First, governmental actions affecting public schools deal with the rights of minors. The Supreme Court has already recognized that the rights of minors are not co-extensive with that of adults. *See* Belloti v. Baird, 443 U.S. 622, 634, 637 (1979). Second, in a number of cases the Supreme Court has recognized that the primary purpose of public education is to inculcate fundamental values necessary for the maintenance of our democratic function. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982); Plyler v. Doe, 457 U.S. 202, 222 n.20 (1982); Ambach v. Norwick, 441 U.S. 68, 77, 99 (1979). The predominance of the value inculcating function of public elementary and secondary education could provide another basis for distinguishing governmental actions that affect public schools from those that affect public colleges and universities. For an argument that the harm of *de jure* segregation within public schools was sui generis, see Brown, *supra* note 42, at 1112-40.

62. WILKINSON, *supra* note 52, at 253.

63. This view animates RICHARD KLUGER, SIMPLE JUSTICE (1976). *See also* Richard B. Sobol, *Against* Bakke, *in* RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY 167-74 (Russell Nieli ed., 1991).

64. *See* Sobol, *supra* note 63, at 167-74.

being asked to address an equal protection challenge by a blue-eyed, blond-haired man of Norwegian ancestry.[65]

Allan Bakke's application to the University of California at Davis medical school was rejected. He brought suit challenging the legality of the school's special admissions program under which 16 of the 100 positions in the class were reserved for "economically or educationally disadvantaged applicants."[66] The medical school viewed individuals who were African-American, Chicano, Asian, or Native American as the only ones fitting the description of disadvantaged applicants. The special admissions program consisted of a separate admissions system operating apart from, but in coordination with, the regular admissions process.

Petitioners argued that the Court should reserve the application of strict scrutiny to situations where the classifications serve to disadvantage discrete and insular minorities.[67] In *Bakke,* four of the justices were prepared to uphold Davis's special admissions program as written.[68] Four other justices were prepared to strike down the program as a violation of Title VI of the Civil Rights Act of 1964.[69] The controlling opinion was, therefore, delivered by Justice Powell.

Before Powell addressed the special admissions program, he had to resolve the preliminary issue of whether the Fourteenth Amendment was to protect discrete and insular minorities from the failures of the majoritarian political process or to protect the rights of all individuals. In rejecting the argument by U.C. Davis, Powell stated that the guarantees of the Fourteenth Amendment extend to all persons. As a result, the Equal Protection Clause cannot mean one thing when applied to one individual and something else when applied to a person of another color.[70]

Powell noted that the perception of racial and ethnic distinctions is rooted in the nation's constitutional history.[71] Quoting from the *Slaughter-House Cases,*[72] Powell candidly admitted that the pervading purpose of the Fourteenth Amendment was the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly

65. WILKINSON, *supra* note 52, at 253.

66. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 265 (1978).

67. The petitioners were relying upon the statement by the Supreme Court in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

68. 438 U.S. at 325-26.

69. *Id.* at 412-13.

70. *Id.* at 289-90.

71. *Id.* at 291.

72. 83 U.S. (16 Wall.) 36, 171 (1873).

freedmen and citizens from the oppression of slavery.[73] This one pervading purpose, however, was replaced because the Equal Protection Clause was virtually strangled in its infancy and relegated to decades of relative obscurity by post-Civil War judicial reactionism.[74] Between the time that the original purpose of the Fourteenth Amendment was strangled and new life was breathed into it, the country had become a nation of minorities, each having to struggle (to some extent still struggle) to overcome the prejudices of a monolithic majority. Despite his recognition of the original purpose of the Fourteenth Amendment, Powell stated:

> It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. . . . Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable.[75]

Powell's opinion rejected the view that the Equal Protection Clause was adopted only to protect discrete and insular minorities. With *Bakke,* the Court began its movement away from a possibly pluralistic conception of a Fourteenth Amendment that could recognize the existence of diverse racial and ethnic groups.[76] However, since Powell only spoke for himself, the Court moved into a period of uncertainty regarding the underlying principles embodied in the Equal Protection Clause. With the Court's opinion in *City of Richmond v. Croson,*[77] the individualistic framework became the firmly entrenched vision of the Supreme Court when interpreting the Equal Protection Clause. In *Croson*, a majority of the Court officially adopted for the first time Justice Powell's argument that the strict scrutiny test should be used for determining any equal protection

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73. 438 U.S. at 291.

74. Some of these cases are discussed later *infra* notes 168-78 and accompanying text.

75. 438 U.S. at 295.

76. The Court's opinion in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), suggests that congressional and federal authorities race-conscious measures receive more deference than those adopted by state and local officials. However, this distinction may only be important to Justice White since the majority opinion in *Metro Broadcasting* is very similar to the dissenting opinion in *Croson*. Moreover, the dissent in *Metro Broadcasting* is very similar to the majority opinion in *Croson*.

77. 488 U.S. 469 (1989).

violation, regardless of whether the measure benefited or harmed certain disadvantaged racial and ethnic minorities.[78]

4. *Individualist framework applied to gender in public education*

In the Court's most significant equal protection case addressing the issue of gender segregation in public education, the individualist framework was also used. In the case of *Mississippi University for Women v. Hogan,*[79] a male respondent, Joe Hogan, sought admission to the Mississippi University for Women[80] ("MUW") School of Nursing's baccalaureate program. Although otherwise qualified, his application was denied solely because of his gender. Hogan sought injunctive and declaratory relief and claimed that the single sex admissions policy violated the Fourteenth Amendment.

Justice O'Connor's five-person majority opinion for the Court noted:

> To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. . . . [T]he test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions.[81]

The argument used by the State of Mississippi to justify the single-sex admissions policy of MUW's School of Nursing was that it compensated for discrimination against women and therefore constituted educational affirmative action.[82] In applying this test to Hogan's exclusion from the School of Nursing, the Court concluded that the State fell short of establishing the persuasive justification needed to sustain the gender-based classification. O'Connor noted that MUW's policy of excluding males

78. Justice O'Connor, joined by Chief Justice Rehnquist, Justice White and Justice Kennedy, adopted strict scrutiny as the requisite test for the Equal Protection Clause, regardless of the race of those benefitted or burdened. *Id.* at 493-94. Justice Scalia, in a separate concurring opinion, also endorsed the concept of strict scrutiny regardless of the governmental purpose. *Id.* at 520 (Scalia, J., concurring); *see also* Shaw v. Reno, 113 S. Ct. 2816 (1993).

79. 458 U.S. 718 (1982).

80. Mississippi University for Women was the oldest state supported all female college in the United States.

81. 458 U.S. at 724-25.

82. *Id.* at 718.

"tends to perpetuate the stereotyped notion of nursing as an exclusively woman's job."[83] She further concluded that since MUW allowed men to audit the class, its educational claim that women are adversely affected by the presence of men was undermined; therefore, the exclusion of men cannot be related to any educational goals.[84]

The Court's opinion in *Hogan* embodies the individualist framework's fundamental conception of society as a collection of knowing individuals. The petitioner was a man who was complaining of discrimination, yet it was the stereotypes about women that were being supported by the female-only nursing program. The Court, therefore, allowed a man's admission to the nursing program partly because rejecting his application furthered stereotypes about women. The admission of men to the nursing program assists the emancipation of women from the traditional and stereotypical roles developed for them by our society and thereby furthers the ability of women to be self-determining.

When the individualist framework is applied to gender discrimination in education, just as when it is applied to race discrimination, it will be difficult to justify a policy of providing gender-segregated education solely to benefit either men or women. To view a governmental program that benefits only one of the genders rejects the conceptual premise of the individualist framework. It would require that we view the social world as being composed not of knowing individuals but of gendered persons.

C. *Implications of the Individualist Framework for Establishing Public Educational Programs to Benefit African-American Males*

The individualistic framework will be one of the frameworks employed to analyze the constitutionality of public educational programs designed to assist African-American males. Given the conceptual structure of the individualist framework, it becomes apparent rather quickly why none of the reasons explained earlier for supporting public educational programs for black males will be considered persuasive arguments within this framework.[85] To justify public educational programs by focusing on the black male's crisis or by attempting to inculcate more effectively feelings of loyalty to other African-Americans, requires us to conceptualize black males as members of a racial and gender group and not as potential knowing individuals. If government were motivated to institute public educational programs based on these considerations, it would be violating

83. *Id.* at 729.
84. *Id.*
85. *See supra* pp. 65-66.

the fundamental idea of individual self-determination.[86] These notions require that government recognize black males as members of a racial group. Thus, their ability to be self-determining is violated by their treatment based upon an unchosen characteristic.

As previously noted, other problems arise if the justification for separate programs is the recognition of a cultural conflict, or the fact that black males inhabit a social category in our dominant culture that is constructed with particularly negative connotations.[87] Justifying public educational programs with these reasons creates problems similar to those that existed for the plaintiffs in *Grimes v. Sobol*.[88] The individualist framework presumes that knowing individuals are capable of standing back from their socialization in order to accurately assess and revise those beliefs. Because of this capacity, attitudes, opinions, and beliefs are seen as products of individual realization. Therefore, to talk about the attitudes, opinions, and beliefs of individuals as products of culture requires the rejection of the conceptual premise that the knowing individual's beliefs are the product of individual realization. Hence, discussions of culture and the implication that beliefs are products of culture requires the rejection of the concept of an essential self that holds beliefs in favor of the concept of a socially constituted self that is a product of acculturation.[89]

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86. Professor Ronald Dworkin has argued that the justification for taking account of race in the context of affirmative action programs is to reduce the race consciousness of our society. He notes that American society is currently a racially conscious society which is the inevitable result of our history. Increasing the number of blacks who work in the professions will in the long run reduce the sense of frustration that blacks feel to the point that they may begin to think of themselves as individuals. By increasing the exposure of blacks to whites will also decrease the degree to which whites think of blacks as a race rather than as people. *See* Dworkin, *supra* note 26, at 175-177. Dworkin, at least on the issue of our racial beliefs, is rejecting the concept of knowing individuals whose beliefs are products of individual realization. Thus, he views current racial beliefs as products of conditions established as a result of our society's discriminatory past. Professor Dworkin's argument is one that views the individualist framework as the ultimate goal and not the present reality. Since we are not currently such a society, it is necessary to implement policies and programs that will reduce race consciousness and involuntary racial associations. Thus, Dworkin's argument is one that would allow race conscious decision-making during the time period where we move from a race conscious society to one that is colorblind. *See also* Paul Gewirtz, *Choice in Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986).

87. *See supra* notes 57-59 and accompanying text.

88. 832 F. Supp. 704 (S.D.N.Y. 1993), *aff'd*, 37 F.3d 857 (2d Cir. 1994).

89. It is possible to argue that ameliorating cultural conflicts should be conceptualized as educational decision-making. *See supra* note 55 (discussing concept of legitimate educational justifications within the individualist framework).

The individualist framework has no conceptual categories in which to assimilate the aforementioned justifications that are consistent with its underlying understandings of the social world. As a result, if those arguments are made in an effort to justify such programs, they will be misunderstood within the individualist framework as attempts to violate the constraints of governmental neutrality. Such arguments will be comprehended as government failing to respect the individuality of its citizens or advancing the parochial interests of black males.

This does not mean that no public educational programs can be provided for African-American males—only that such programs need to be a part of a much larger approach that respects the constraints of governmental neutrality. The larger approach, of which assistance for black males can be a component, must respect everyone's individuality and not appear to advance only the parochial interest of black males. The larger approach must be one that seeks to provide options for diversity in education for everyone in the public school system. The justifications for such an approach should be based upon their educational suitability and not upon any desire to respond to a "crisis among black males," counter cultural problems[90] or heighten intragroup sensibilities. To illustrate the structure of this argument in the area of race and education, I will examine Justice Powell's opinion in *Bakke* and Justice Thomas's recent opinion in *United States v. Fordice*.[91] To depict the structure of this argument in the context of gender and education, I will look at the recent cases addressing Virginia Military Institute and The Citadel—two publicly funded all-male colleges.

1. *Application of the individualist framework in the area of race and public education*

The individualist framework is generally hostile to race-motivated decision-making. There have, however, been two notable exceptions where certain Justices of the Supreme Court have endorsed a limited role for race-based decision-making as part of the exercise of legitimate educational decision making. Justice Powell's opinion in *Bakke* addressed the issue of educational justifications for considering the race of an applicant to a given school. Justice Thomas's opinion in *United States v. Fordice* addressed the issue of educational justifications for allowing the State of Mississippi to operate historically black institutions among its diverse assortment of colleges and universities. Both opinions also stressed

90. Unless these cultural problems are discussed solely as educational problems.
91. 112 S. Ct. 2727 (1992).

the importance of government respecting the individuality of applicants to the schools. That individuality, however, was affirmed in different ways by these two opinions.

a. Justice Powell's opinion in *Bakke*

I have already discussed Powell's opinion in *Bakke*.[92] The reason I discussed it then was to show how he moved from a conception of the Equal Protection Clause that could recognize groups, to one that viewed society as a collection of individuals. In this section, I will discuss Powell's opinion to show how he found non-racial educational justifications for what could also be viewed as race-conscious decision-making in the admissions process.

In addressing the U.C. Davis affirmative action program, Powell applied strict scrutiny. Powell indicated that to survive strict scrutiny, U.C. Davis had to establish a purpose or interest that was both constitutionally permissible and substantial. In addition to demonstrating such a use, it was also necessary for U.C. Davis to establish that its classification of people was necessary for accomplishing that purpose or safeguarding that interest.[93] Davis argued that its special admission program was to serve four purposes: (1) reduce the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (2) counter the effects of societal discrimination; (3) increase the number of physicians who will practice in communities currently underserved; and (4) obtain the educational benefits that flow from an ethnically diverse student body.[94]

Justice Powell found only the fourth asserted purpose to be substantial enough to support the use of a suspect classification. Such a purpose is consistent with the notion of academic freedom which, though not specifically enumerated as a constitutional right, has long been viewed as a special concern of the First Amendment.[95] The atmosphere of speculation, experiment, and creation that is widely thought to be essential to the quality of higher education is generally thought promoted by a diverse student body. Thus, a diverse student body provides a better atmosphere for the robust exchange of ideas that improves the educational environment. When U.C. Davis evoked the educational justification for its use of a suspect classification, it was seeking to achieve a goal that it viewed as

92. *See supra* notes 60-76.
93. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978).
94. *Id.* at 306.
95. *Id.* at 312.

being of paramount importance to the fulfillment of its educational mission.[96]

Powell accepted the notion that the exercise of educational expertise gives colleges and universities the discretion to use a suspect classification in order to obtain a certain amount of diversity. This discretion, however, is limited when applied to suspect classifications.[97] According to Powell, the diversity that furthers the compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single, though important, element.

Powell stressed the importance of examining each student's application individually in order to scrutinize whether a particular applicant advanced the racially and ethnically neutral concept of diversity in education. The use of racial or ethnic set-asides could actually reduce the ability of a school to obtain that diversity. Using race or ethnicity as a positive factor, rather than to meet a quota, allows the school to compare the minority's application with that of the other students. In that way, the entire file of each particular minority applicant can be scrutinized to determine whether it contributes more to the diversity of the student body than the application of say an Italian-American.[98]

Powell's opinion recognizes that legitimate educational justifications exist to take race into account in limited situations. This limited consideration of race in the admissions process can be viewed as an educational decision which has racial implications, instead of a racial decision with educational implications. Viewing the decision as one that is motivated primarily by educational concerns has important consequences for the constraints of governmental neutrality within the individualistic framework. Powell stressed that considering each applicant on an individual basis was important as this is necessary to assure that the school respects the individuality of each and every applicant for admission. Thus, public educational experts can apply their expertise in order to deliver an improved and more effective educational product. By improving the educational environment, this limited consideration of race advances the interest of all students enrolled in such programs. Accordingly, legitimate educational decisions do not violate the requirements of governmental neutrality even though they may have racial implications.

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96. *Id.* at 313.
97. *Id.* at 314.
98. *Id.* at 317.

b. Justice Thomas's opinion in *United States v. Fordice*

In *United States v. Fordice*,[99] the Supreme Court addressed for the first time the obligation of a state to eradicate the vestiges of a segregated school system within the state's universities. Over the years, the state of Mississippi had established eight publicly funded universities. Five were established for white students and three were established for African-American students.[100] In 1975, a group of African-American citizens brought a class action suit against the State of Mississippi and claimed that the state maintained racial segregation in its dual system of higher education.[101] Efforts to negotiate a settlement eventually collapsed because the parties could not agree on whether the state had taken sufficient steps to dismantle its dual school system. As late as 1986, the faculty and student bodies of these universities were overwhelmingly drawn from the same racial group that the universities were originally established to serve.[102] Nevertheless, Mississippi contended that it had fulfilled its duty to dismantle the dual system by implementing and maintaining in good faith nondiscriminatory policies in student admissions, faculty hiring, and operations.[103]

The district court and the court of appeals en banc agreed with the state's arguments.[104] The Supreme Court, however, vacated the decision of

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99. 112 S. Ct. 2727 (1992).

100. The three universities established for blacks were Jackson State University, Alcorn State University and Mississippi Valley State University. The five universities established for whites were University of Mississippi, Mississippi State University, Mississippi University for Women, University of Southern Mississippi and Delta State University.

101. Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990), *aff'd en banc*, 914 F.2d 676 (5th Cir. 1990), *vacated sub nom.* United States v. Fordice, 112 S. Ct. 2727 (1992). The United States intervened as a plaintiff.

102. At that time, 99% of the white students (26,759 out of 26,953) were enrolled in one of the historically white institutions. Seventy-one percent of the black students (9,125 out of 12,826) were enrolled in one of the historically black institutions. In addition to racial imbalance with respect to students, there was also considerable racial imbalance with respect to faculty. In 1986, less than 5% of the faculty at any of the historically white institutions were African-American, and yet, their percentage exceeded two-thirds at the three historically black institutions. *Ayers*, 893 F.2d at 735-37.

103. *Fordice*, 112 S. Ct. at 2733.

104. The district court concluded that the affirmative duty in the context of higher education to dismantle a racially dual system places greater emphasis "on current state higher education policies and practices in order to insure that such polices and practices are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions." *Ayers*, 674 F.

(*continued*)

the en banc panel of the Fifth Circuit and remanded the case to the lower court. The remedial duty which the Supreme Court imposed on states in the university context focuses on the specific policies and practices of the state's university system. The Court held:

> [If] the State perpetuates policies and practices traceable to its prior [dual university] system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.[105]

The latter part of the Court's opinion applied the test articulated above to four policies and practices of the present Mississippi university system.[106] One of the policies highlighted by the Court was Mississippi's operation of eight universities, five for whites and three for blacks. The Court concluded that based on the record, it was unable to say whether it was necessary to close any of the universities. The Court's opinion, however, made it clear that Mississippi could not upgrade its historically black colleges "so that they may be publicly financed, exclusively black enclaves by private choice."[107] Nevertheless, the Court avoided explicitly addressing the possibility of whether the operation of a historically black college, as such, could fit within the determination of sound educational policies. On remand, it directed the lower court to carefully explore

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Supp. at 1554. When the district court applied this standard to the university system it found that there was no current violation of federal law. *Id.* at 1554-64. "In summary, the court finds that current actions on the part of the defendants demonstrate conclusively that the defendants are fulfilling their affirmative duty to disestablish the former *de jure* segregated system of higher education." *Id.* at 1564.

The court of appeals rehearing en banc affirmed the decision by the district court. With a single exception it did not disturb the district court's findings of fact or conclusions of law. *Ayers*, 914 F.2d at 682-89. The court of appeals agreed that Mississippi was constitutionally required to eliminate invidious racial distinctions and dismantle its dual system. *Id.* "That duty has been discharged because the record makes clear that Mississippi has adopted and implemented race neutral policies for operating its colleges and universities and that all students have real freedom of choice to attend the college or university they wish." *Id.* at 678.

105. *Fordice*, 112 S. Ct. at 2737.

106. The four policies were admission standards, program duplication, institutional mission assignments, and continued operation of all eight public universities. *Id.* at 2738.

107. *Id.* at 2743.

whether the maintenance of each of these universities is educationally justifiable.

In a concurring opinion, Justice Thomas wrote to specifically address the issue of historically black colleges. He emphasized the fact that the Court's opinion did not portend either the destruction of historically black colleges or the severance of those institutions from their distinctive histories and traditions. He noted that the Court's opinion does "not foreclose the possibility that there exists sound educational justification for maintaining historically black colleges as *such*."[108] Thomas went on to note that a state, though not constitutionally required, is not forbidden from operating "a diverse assortment of institutions—including historically black institutions—open to all on a race-neutral basis, but with established traditions and programs that might disproportionately appeal to one race or another. No one, I imagine, would argue that such institutional diversity is without 'sound educational justification.'"[109]

Justice Thomas may be reading a permissiveness into the majority opinion which is unwarranted.[110] Nevertheless, his opinion, like that of Justice Powell, formally respects the constraints of governmental neutrality embedded in the individualistic framework. The decision to operate a

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108. *Id.* at 2746 (Thomas, J., concurring) (emphasis added). Thomas praised historically black colleges because they exercised leadership in developing educational opportunities for blacks. Mississippi must consider the educational needs of its present and future students in its university system. *Id.*

109. *Id.*

110. Justice Scalia's separate opinion demonstrates that it is quite possible to dispute Justice Thomas's assertion that this kind of institutional diversity is based on sound educational policy. Scalia interprets the Court's opinion as rejecting the possibility that a state may consciously follow a policy of facilitating the continued existence of historically black colleges. *Id.* at 2752 (Scalia, J., concurring in part and dissenting in part). He argues that no educational policy can justify public universities that cater to a predominantly black clientele. *Id.* The only conceivable educational value of fostering such a policy is the belief that blacks should receive their education in a predominantly black setting. *Id.* This would contradict the principle that justified compulsory integration in Green v. New Kent County Sch. Bd., 391 U.S. 430 (1968). *Fordice,* 112 S. Ct. at 2752 (Scalia, J., concurring in part and dissenting in part).

Justice O'Connor also wrote a concurring opinion. *Id.* at 2743 (O'Connor, J., concurring). She did not specifically mention the issue of the continued maintenance of historically black colleges, as such, but her opinion seemed to be written with them in mind. *Id.* She stressed that Mississippi has a heavy burden to meet if it wishes to maintain certain remnants of its prior system. *Id.* She further noted that even if the state can show that maintenance of certain remnants of its prior system is essential to accomplish its legitimate goals, then it still must prove that it has counteracted and minimized the segregative impact of such policies to the extent possible. *Id.* at 2744.

diverse assortment of educational institutions including a historically black college, as such, is viewed by Thomas primarily as an educational decision with racial implications. This decision must rest upon sound educational justifications for determining the most appropriate educational institutions that Mississippi should operate. Since the decision to operate a diverse assortment of colleges and universities is motivated by educational considerations, as opposed to racial considerations, it does not advance the parochial interest of any given racial group or stigmatize any group.

Thomas stresses that the diverse assortment of institutions must be open to all on a race-neutral basis. With race-neutral admissions policies, the State of Mississippi would not be treating potential applicants as members of a racial group. Each applicant is allowed to choose the educational situation that seems most appropriate to their self-determined goals and objectives. The open admissions policy, therefore, can be said to respect the individuality of potential applicants. Any resulting segregation of the student body would be the product of individual self-determination. Hence, Thomas's conceptualization of historically black universities respects the constraint of governmental neutrality embedded within the individualistic framework.

2. *Application of the individualist framework in gender-segregated schools*

The Supreme Court's opinion in *Mississippi University for Women v. Hogan*[111] is the primary case addressing the issue of gender-segregated education.[112] Within the individualist framework, the issue of publicly funded gender-exclusive schools has been addressed recently in two different cases by lower federal courts. In *United States v. Virginia*,[113] the Fourth Circuit was called upon to address an equal protection challenge to the state of Virginia's operation of the male-only Virginia Military Institute ("VMI"). The South Carolina district court subsequently applied the

111. 458 U.S. 718 (1982). For an analysis of *Hogan*, see *supra* notes 79-84 and accompanying text.

112. The Court also addressed this issue in Vorchheimer v. School Dist., 430 U.S. 703 (1977) (per curiam). The city of Philadelphia operated a number of coeducational academically high-tracked high schools. Vorchheimer v. School Dist., 532 F.2d 880, 881 (3d Cir. 1976). But, Philadelphia segregated the boys from the girls in its best academic high schools. *Id.* An evenly divided Court upheld this separate but equal gender segregated educational practice. 430 U.S. at 703.

113. 976 F.2d. 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993). For the purposes of this article, this case will be referred to as *VMI*.

Fourth Circuit's ruling after a challenge to the male-only admissions policy at The Citadel in *Faulkner v. Jones*.[114]

a. *United States v. Virginia*

This case originated on March 1, 1990, when the United States Department of Justice filed a complaint on behalf of a female high school student who wanted to be considered for admission to the VMI. Even though VMI has never accepted applications from women, it received over 300 inquiries from them during the two years prior to the filing of this action.[115] VMI, which currently enrolls about 1,300 male students, was established in 1839 as a four-year military college. The complainant in this action sought an order enjoining the defendants from discriminating on the basis of gender and requiring them "to formulate, adopt, and fully and timely implement a plan to remedy fully their discriminatory policies and practices."[116]

After a six-day trial which commenced on April 4, 1991, the district court concluded that VMI's male-only admissions policy was fully justified by a generally accepted benefit found in single-sex education. The court also concluded that the admission of women would significantly change the methods of instruction and living conditions. From the outset, Judge Kiser began his analysis by noting that all parties recognized that the case concerned educational policy.[117] The district court rejected the contention that VMI was analogous to the School of Nursing in *Mississippi University for Woman v. Hogan*.[118] Unlike the record in *Hogan,* where the exclusion of men was not necessary to reach any of MUW's educational goals, the

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114. 858 F. Supp. 552 (D.S.C. 1994).

115. 976 F.2d at 894.

116. *Id.*

117. United States v. Virginia, 766 F. Supp. 1407, 1407 (W.D. Va. 1991), *vacated*, 976 F.2d 890, *cert. denied*, 113 S. Ct. 2431 (1933). Therefore, the district court went on to see the case as one involving academic freedom, an aspect of the freedom of association guaranteed by the First Amendment. *Id.*

The argument could be made that the higher education cases I have discussed, *Bakke, Fordice,* and *VMI*, are not applicable in the *Garrett* case because in those cases the issue of academic freedom is involved. The principle of academic freedom is seen as an aspect of the freedom of association guaranteed by the First Amendment. *Id.* at 1409. The essential requirement for academic freedom of a university is that the university should be able to choose who may be admitted to study there. This freedom has been recognized by the Supreme Court and could be seen as the reason to defer to the academic decision-making by the university. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 n.2 (1978).

118. 458 U.S. 718 (1982).

district court concluded that the record in this case was replete with testimony that single-sex education at the undergraduate level is beneficial to both males and females.[119] The court stated:

> A substantial body of "exceedingly persuasive" evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college. For those students, the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement. . . .
>
> One empirical study in evidence, . . . demonstrates that single-sex colleges provide better educational experiences than coeducational institutions. Students of both sexes become more academically involved, interact with faculty frequently, show larger increases in intellectual self-esteem and are more satisfied with practically all aspects of college experience (the sole exception is social life) compared with their counterparts in coeducational institutions. Attendance at an all-male college substantially increases the likelihood that a student will carry out career plans in law, business and college teaching, and also has a substantial positive effect on starting salaries in business. Women's colleges increase the chances that those who attend will obtain positions of leadership, complete the baccalaureate degree and aspire to higher degrees.[120]

The district court noted that the most striking difference, however, between *VMI* and *Hogan* was the justification for the single-gender admissions policy.[121] Virginia argued that the male-only admissions policy at VMI promotes diversity within its statewide system of higher

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119. 766 F. Supp. at 1411. The court also noted that the evidence established that key elements of the adversative VMI educational system would be fundamentally altered and the distinctive ends of the system thwarted if VMI were forced to accommodate the needs and interests of women. *Id.*

120. *Id.* at 1412 (citing ALEXANDER ASTIN, FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977)).

121. The argument used by the State of Mississippi to justify the single-sex admissions policy of MUW's School of Nursing was that it compensated for discrimination against women and, therefore, constituted educational affirmative action. *Hogan*, 458 U.S. at 727.

education.[122] The district court concluded that diversity in education was a legitimate state interest. The district court also found that "both VMI's single-sex status and its distinctive educational method represent legitimate contributions to diversity in the Virginia higher education system and that excluding women is substantially related to this mission."[123] The addition of women to VMI would undermine its uniqueness.

The Fourth Circuit vacated and remanded the case for further consideration by the district court.[124] The Fourth Circuit stated:

> The argument by the government that VMI's existing program is maintained as the result of impermissible stereotyping and overly broad generalizations, without a more detailed analysis, might lead, if accepted, to a finding that would impose a conformity that common experience rejects. Men and women are different, and our knowledge about the differences, physiological and *psychological,* is becoming increasingly more sophisticated. Indeed the evidence in this case amply demonstrated that single-genderedness in education can be pedagogically justifiable.[125]

The Fourth Circuit agreed with the district court that the data supports pedagogical justifications for single-sex education and that such single-sex education appears to benefit men and women in a similar manner.[126] The Fourth Circuit concluded, however, that despite the Commonwealth of Virginia's announced policy of diversity, it failed to articulate an important policy that substantially supported offering the unique benefits of a VMI-type of education to men and not to women.[127] The Fourth Circuit remanded the case to the district court to give the Commonwealth the responsibility of selecting a course of action that satisfies the Fourteenth Amendment. The Fourth Circuit indicated that the Commonwealth might "decide to admit women to VMI and adjust the program to implement that

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122. 766 F. Supp. at 1411.

123. *Id.* at 1413.

124. 976 F.2d 890 (4th Cir. 1992).

125. *Id.* at 897 (emphasis added). The court also cited ALEXANDER ASTIN, FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977). It also cited to a study conducted by Marvin Bressler and Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 650 (1980).

126. 976 F.2d. at 897-98.

127. *Id.* at 898.

choice, or *it might establish parallel institutions or parallel programs*, or it might abandon state support to VMI and leave it the option of pursuing its own policies as a private institution."[128]

The suggestion by the Fourth Circuit that establishing a parallel program for women would comply with the Equal Protection Clause must be further examined. This suggestion can be construed as respecting the constraints of governmental neutrality embedded in the individualist framework. Both the district court and the Fourth Circuit stressed the fact that the decision to establish and maintain gender-segregated educational programs was based upon pedagogical justifications. Thus, it was an educational decision with gender implications and not a gender decision with educational implications.

Parallel gender-segregated schools would respect the self-determination of potential applicants because those who applied would do so only for their own individual reasons. If a particular person preferred a coeducational college, that would also be available. Thus, Virginia would be multiplying the higher education options available to both men and women. Since the option of gender-segregated education is available to both male and female applicants, the interests of both are being advanced. Hence, parallel gender-segregated institutions would not favor the parochial interest of one gender group over another. Thus, government sponsored parallel gender-segregated schools could be seen as consistent with the constraint of governmental neutrality.

There is a major argument concerning the ability to establish a new parallel program for women that would be the equivalent of VMI. The Court addressed this issue in the context of race in one of the graduate school cases during the separate but equal era that preceded *Brown I*. In *Sweatt v. Painter*,[129] Heman Marion Sweatt's application for admission to the University of Texas Law School in Austin was rejected solely because he was black. Texas had established a separate law school for African-Americans and argued that Sweatt could receive an education there that was comparable to that offered by the University of Texas. In an opinion authored by Chief Justice Vinson, the Court rejected the notion that a newly formed school would provide Sweatt with an education equivalent to that of the University of Texas Law School. In addition to the disparity

128. *Id.* at 900 (emphasis added).
129. 339 U.S. 629 (1950).

between the two schools with regard to tangible factors, Vinson also noted intangible factors:

> What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.[130]

A newly-formed, gender-segregated college established for women can duplicate the physical attributes of VMI. Such a school, however, cannot possibly hope to duplicate the intangibles that attach to a school like VMI, which has a 150-year history. A counter-argument can be advanced that a parallel VMI for women is distinguishable from *Sweatt v. Painter*. Texas was only allowing Sweatt to attend the law school set up for blacks. Thus, Sweatt did not also have the other coeducational options that would still be available to women in Virginia. A parallel VMI for women—though not necessarily equal to VMI—may, nevertheless, amount to substantial equality.

b. *Faulkner v. Jones*

The Fourth Circuit's opinion in *VMI* was followed by a federal district court in South Carolina in *Faulkner v. Jones*.[131] Shannon Faulkner's application for admission to The Citadel was originally granted when they thought she was a male, but was later rejected after they learned of her gender. On March 2, 1993, Faulkner instituted an action against The Citadel and others.[132]

The Citadel is a publicly funded military college in South Carolina that was established in 1842. Since that time, the primary mission of the school has been to educate male undergraduates as members of the South Carolina Corps of Cadets and to prepare them for post-graduate positions of leadership. The Citadel accomplishes its mission by providing academic

130. *Id.* at 634.

131. 858 F. Supp. 552 (D.S.C. 1994).

132. Faulkner sued members of the Board of Visitors of The Citadel, Wallace I. West, Jr., Director of Admissions and Recruiting at The Citadel, and Claudius E. Watts, III, President of The Citadel. *Id.* at 555. On June 7, 1993, the United States of America was permitted to intervene as a plaintiff and the State of South Carolina, The Citadel and the Citadel's Board of Visitors were added as defendants. *Id.*

programs of recognized excellence supported by the best features of a disciplined military environment.[133] The Citadel has never admitted women to its day program. Its coeducational night program does, however, offer some baccalaureate degree programs.

In addition to The Citadel, South Carolina operates eleven other public colleges and universities all of which are coeducational.[134] There are also twenty, four-year private colleges operating in South Carolina. All of these are coeducational, with the exception of two which are female-only colleges. The Citadel is, therefore, the only all male college in the state of South Carolina.

Until 1974, South Carolina had maintained a female-only college—Winthrop College, The South Carolina College for Women. Its board of trustees, however, decided to convert it to a coeducational institution. The district court found that the college did not become coeducational to discriminate against women. Rather, the primary reason was to serve the educational needs of the citizens of South Carolina better, particularly those within the geographical area of Winthrop College, by providing better programs, better faculty, and better facilities. Another reason, however, was the college's declining enrollment.[135]

Since the defendants agreed that the Fourth Circuit's opinion in the VMI case applied, the only relevant issue was whether there existed a distinction between South Carolina's situation with The Citadel and Virginia's situation with VMI. Unlike Virginia, South Carolina argued that it could advance a justification for limiting the benefit of gender-segregated education only to males. The defendants argued that at the time, the demand for single-gender education for women in South Carolina was fully met by the two private women's colleges in the state. Some female South Carolina students at these colleges received public financial support through the state's Tuition Grants Program.[136] Therefore, the state's justification for not providing the benefit of a public gender-segregated college for women was that there was an inadequate demand.

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133. *Id.*

134. In the fall of 1993, 32,642 women and 22,831 men were enrolled in South Carolina's public institutions of higher education. *Id.* at 560. Approximately 2,000 of the men were enrolled at The Citadel. *Id.*

135. *Id.* at 556.

136. South Carolina's budget for higher education is $650,000,000. *Id.* at 557. Seventeen million dollars of that is set aside for a Tuition Grants Program, which provides 6,606 students with an average grant of $2,529 in 1993. *Id.*

The district court correctly rejected this argument, as the rights of the Equal Protection Clause are personal and individual; it is not women, the gender, but Shannon Faulkner, the individual, who is entitled to equal protection.[137] The court stated that a lack of demand for a certain type of equal protection cannot be used as a justification for denying an individual's right, because this would deny the very basis of the right.

3. *Structure of and arguments for public educational programs that assist African-American males*

If public educational programs are directed towards assisting only African-American males, then government is engaged in the process of making decisions motivated by racial and gender considerations that advance the parochial interest of black males. Even though the aggregate statistics pointing to the conditions of African-American males in public schools may show that their performance is substandard as a group, as Justice O'Connor noted in *Metro Broadcasting, Inc. v. FCC,* more than just statistical disparity is needed.[138] When one sees the analysis of the Equal Protection Clause within the individualist framework, the reason becomes clear. For in this framework, it is the individual that matters and not conditions of the racial and gender groups. Therefore, the existence of statistical disparity among such groups is largely irrelevant, because focusing upon such statistics requires that we reject the fundamental view of the individualist framework.[139] In short, any statistical disparity between race or gender is not a recognizable concept, unless it is the result of intentional discriminatory conduct.[140]

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137. The district court cited one of the Supreme Court's pre-*Brown I* graduate school cases, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). *Faulkner*, 858 F. Supp. at 564. In that case, the State of Missouri operated a law school for whites, but not for blacks. *Missouri ex rel. Gaines*, 305 U.S. at 342. The law school rejected the plaintiff's application for admission because he was black. *Id.* Though Missouri offered to pay the plaintiff's tuition to any law school in an adjacent state, Missouri argued that it did not need to provide him with a law school in the State of Missouri, because there was an insufficient demand for a separate law school for blacks. *Id.* The Supreme Court rejected that argument noting that the plaintiff's rights were individual and that he, not his race, was entitled to equal protection of the laws. *Id.* at 351.

138. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 620 (1990) (O'Connor, J., dissenting).

139. *See* McClesky v. Kemp, 753 F.2d 877, 898-900 (11th Cir. 1985).

140. The Supreme Court has previously rejected a number of potential arguments for satisfying the compelling state interest prong of strict scrutiny. It has rejected the notion that societal discrimination could be used to establish a compelling state interest, because it is too vague. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497 *(continued)*

Even though the individualist framework will be hostile to efforts targeted solely for the benefit of black males, that does not exhaust the ability of school officials to structure programs that might allow them to assist this group. In order to provide programs to assist African-American males that fit within the constraints of this framework, a certain amount of imprecision is required. These programs must necessarily respect the individuality of all students and be broad enough to encompass more than just the interests of black male students.

Public school officials could seek to establish separate schools or classrooms for both males and females based upon legitimate educational concerns.[141] In a predominantly minority school system, it will be easier to isolate black males because race is not an issue.[142] Conversely, in a multi-racial school system the issue will be more complicated. School officials would probably have to decide to set up a number of gender-segregated schools located in various areas of the school district in order to isolate African-American males in a given school.

The justification for such programs should be the benefits derived by some students (males and females) from gender-segregated education. There are a number of studies that have suggested positive educational benefits can accrue to both males and females from gender-segregated education.[143] The school district could tailor the education of both males

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(1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276-77 (1986) (rejecting societal discrimination as a compelling justification for racial classifications made in the context of public education); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 297-98 (1978). The Supreme Court has also rejected an argument that could have justified race-based decision-making in public education by pointing to the needs of African-American children to see minority school teachers who could act as role models. The so-called role model theory was argued and rejected in *Wygant*, 476 U.S. at 275-76.

141. In addition to the possible equal protection violations, there is also a possible violation of Title VI and Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681 (1990). There may also be state antidiscrimination statutes that might restrict or prohibit the institution of governmental programs for the benefit of black males.

142. A recent report issued by the National School Boards Association indicated that racial segregation, which had remained relatively stable from 1972 through the late 1980s, has begun to increase. In 1991, 66% of African-American school children attended predominantly minority schools, up from 63% in 1986. Latinos are even more concentrated in predominantly minority schools. The proportion of Latinos in minority-dominated schools has increased from 54% in 1968, to 73% in 1991. William J. Eaton, *Segregation Creeping Back in U.S. Schools*, S. F. CHRON., Dec. 14, 1993, at A15.

143. *See, e.g.*, ALEXANDER W. ASTIN, FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977); Marvin Bressler & Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 650 (1980).

and females in order to address the academic concerns which affect them differently. Since educational considerations motivate the establishment of these programs, school officials would not be engaging in social engineering.[144] Instead, they would be providing alternative forms of education for all students. School officials could be viewed as exercising their expertise in the decision to establish such programs. Hence, the decision to set up such a program could be considered an educational decision with gender implications.

Attendance at these programs should be left to the individual choice of parents and students. Providing the option of gender-segregated education to all students respects the individuality of each student. This option adds diversity to the educational choices available to all students and, thereby, helps them and their parents to select the most appropriate educational setting for the student.

A public school system which is seeking to establish separate but equal gender-segregated schools would probably not face the potential equality argument that could be advanced against Virginia and South Carolina. Since the male and female programs would both be new, the equality analysis of the programs will be limited. The analysis is much more likely to focus primarily upon objective factors which the public school system can control.[145]

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144. One can see this argument in Justice Powell's opinion in *Bakke*. Davis argued that its special admission program was to serve four purposes: (1) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in communities currently underserved; and (4) obtaining the educational benefits that flow from an ethnically diverse student body. Justice Powell addressed each of the four purposes separately to determine if they were substantial enough to support the use of a suspect classification. Given the structure of the U. C. Davis program, he found that the first three purposes did not justify the use of a suspect classification. This is in part because these purposes are outside of the expertise and responsibilities of educators. The fourth purpose—which Justice Powell concluded was compelling enough to justify racial classification—was not. *Bakke*, 438 U.S. at 311.

145. Even if this is done, it is still an uphill argument to convince a court that the individualist framework does apply. Plenty of scholars and judges have criticized Justice Powell's opinion in *Bakke* as one that violated the individualist notion of governmental neutrality. *See, e.g.*, Antonin Scalia, *The Disease as Cure: "In order to get beyond racism, we must first take account of race,"* 47 WASH. U. L.Q. 147 (1979).

In *United States v. Fordice*, Justice Scalia's separate opinion shows that it is possible to dispute Justice Thomas's assertion that there could be sound educational justifications for maintaining historically black colleges as such. United States v. Fordice, 112 S. Ct. 2727, 2752 (1992) (Scalia, J., concurring in part and dissenting in part). Justice Scalia interpreted the same majority opinion for the Supreme Court that Justice Thomas did. He

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III. THE TRADITIONAL FRAMEWORK

The Supreme Court has a long judicial history of employing a traditional analysis when addressing racial issues. The traditional framework rejects the view of society as a collection of knowing individuals. Instead, its basic organizing premise is that society is composed of knowing individuals who are Caucasians of European descent or involuntary members of various substandard groups, such as African-Americans. The pre-*Brown I* use of the traditional framework provided the conceptual basis for justifying slavery and *de jure* segregation. The post-*Brown I* use of the traditional framework justified special remedial programs to ameliorate the presumed deficiencies of African-Americans.

The Supreme Court has used a traditional analysis to address the legality of separate treatment for African-Americans. This framework, however, should be irrelevant when the focus is on separate treatment for males.[146] The Supreme Court's historical jurisprudence has not viewed

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concluded that the majority would not allow the state to consciously follow a policy of advancing programs that perpetuate historically black colleges as such, even if it determined admissions in a racially neutral manner. *Id.* He argues that a policy to provide public universities that cater to a predominantly black clientele could not be justified as an exercise of sound educational policy. *Id.* Justice Scalia went on to note that the only conceivable educational value of fostering such programs and policies is the belief that blacks should receive their education in a predominantly black setting. *Id.* Which is to say that Justice Scalia did not see such a decision as an educational decision with racial implications, but rather as a racially motivated decision with educational implications.

146. The Court has used a pejorative framework in the past which views women in some relevant way as less than men. A good example is the Supreme Court's opinion in Bradwell v. The State, 83 U.S. 130 (1872). In *Bradwell*, the Court refused to find a constitutional right of a woman to practice law. Myra Bradwell applied to the State of Illinois for admission to the bar, but was denied because of her gender. The Supreme Court of Illinois stated that "as a married woman [she] would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client." *Id.* at 131. The Supreme Court of Illinois in a subsequent proceeding went on to state that the Legislature did not intend women to be lawyers when it passed regulations on admission to the Illinois state bar. *Id.* at 132. The Court explained that at the time the law was passed the belief that "God designed the sexes to occupy different spheres of action and that it belonged to men to make, apply and execute laws, was regarded as an almost axiomatic truth." *Id.*

Bradwell argued that the limitation by Illinois of the practice of law to just males was a denial of one of her privileges as a citizen of the United States under the Privileges and Immunity Clause of the 14th Amendment. *Id.* at 133. The Court rejected the notion that practicing law was a privilege of a citizen of the United States, but found it was rather a privilege of the state in which the person resided. *Id.* at 139. Therefore Illinois could determine the appropriate qualifications to practice law. *Id.*

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males as substandard. In the context of public educational programs to address the plight of African-American males, the traditional framework will be applicable not because these individuals are males but because they are black. Since the conceptual focus within this framework is on African-Americans as a group, the condition of black females is not seen as being separate from that of black males. As a consequence, public school officials will find it difficult to justify programs only for black males without providing similar alternative programs for black females.

The Supreme Court has not officially adopted the traditional framework as explicitly as I will discuss it. The application of this framework will instead take the form of discussing what constitutes compelling justifications for racial classification under strict scrutiny. For intermediate scrutiny, the traditional framework will masquerade in the discussion concerning what constitutes important governmental interests for gender-based decision-making. With regard to public educational programs that could assist black males, this framework will probably be applied only in a public school system like Detroit, where the student population is predominately black.

A. *The Conceptual Structure*

The Supreme Court did not develop the traditional framework in a vacuum. It was developed against the backdrop of a long history of constitutional jurisprudence that recognized African-Americans as a distinct

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Justice Bradley in his concurring opinion justified the conclusion that women should not practice law by finding it was inconsistent with the role that women should play. *Id.* at 141-42 (Bradley, J., concurring).

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicated the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . .
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> . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Id.

class. This distinctiveness was used to justify different and generally subordinating treatment of African-Americans because of their race. The Court's recognition of racial difference has almost always been based upon an explicit or implicit notion that blacks in some important ways were less than whites.

The underlying conception of the social world within this framework rejects the individualist conception of society as a collection of knowing individuals. Instead, the traditional framework views society as being composed of knowing individuals (primarily Caucasians of European ancestry) and involuntary members of various substandard groups. African-Americans would be one such substandard group. According to the traditional framework, African-Americans are conceptualized as less than the applicable norm in some relevant way. It may be that due to the Supreme Court's opinion in *City of Richmond v. J.A. Croson Co.*,[147] we are in a period where arguments within the traditional framework will no longer satisfy the Equal Protection Clause. At this time, however, the Court's jurisprudence addressing racial classifications employs strict scrutiny and, at least officially, has not accepted the colorblind analysis that the individualist framework implies.[148]

The modern version of the traditional framework, when applied to African-Americans, is based upon the notion that the experience of racial

147. 488 U.S. 469 (1989) (holding that strict scrutiny applies to all racial classifications by governmental entities, regardless of the intended beneficiaries).

148. *See, e.g., id.* at 497-98 (rejecting a number of arguments that could have created a compelling state interest including societal discrimination and the historic underrepresentation of minorities in the construction industry); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276-77 (1986) (rejecting societal discrimination as a compelling justification for racial classifications, made in the context of public education); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 297-98 (1978). According to Justice O'Connor's dissenting opinion in *Metro Broadcasting*, the only compelling state interest that may justify racial classifications as indicated by the Supreme Court, is remedying the effects of identifiable and proven acts of discrimination. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 611 (1990) (O'Connor, J., dissenting).

In addition to the difficulty the Supreme Court's relevant precedent has created in providing a compelling state interest, the narrow tailoring prong of strict scrutiny also provides an additional hurdle. According to the Court's opinion in *Croson,* the narrow tailored aspect prevents the use of illegitimate racial prejudice or stereotypes as the basis for such decisions. 488 U.S. at 493. Even though racial generalizations may have some empirical basis, they inevitably do not apply to all African-Americans. *Metro Broadcasting*, 497 U.S. at 620. Hence, attempting to cite negative social statistics about the social or educational performance of blacks (males) as a group runs the risk of failing narrow tailoring, because the argument can be made that basing decisions on the use of such statistical evidence amounts to stereotyping.

subordination, including slavery and segregation, has negatively impacted African-Americans. The result of this historical experience has currently produced a group of people who are still handicapped by and suffering from the psychological, emotional, and economic scars engendered by that experience. At its most charitable level, this framework would accept the notion that African-Americans should not be held responsible for their current deficit condition; nevertheless, it views African-Americans as deficient in some relevant way.

B. *The Constitutional Historical Development*

1. *The traditional framework prior to* Brown v. Board of Education

The antecedents of the modern version of the traditional framework are rooted in America's antebellum and segregation eras. Most of the legal history of black/white race relations in this country is a story of recognizing blacks as members of a distinct group in order to subordinate them.[149] The first known report of blacks to arrive in what was to become the United States comes from a log kept by John Rolfe of the Virginia colony. He wrote in 1619 "there came to Virginia a Dutchman of Warre that sold us twenty Negers."[150]

By the time the founding fathers began the task of drafting the Constitution, the former colonies had over 150 years of experience with blacks. In the Declaration of Independence, the founders boldly declared that all men were created equal and "endowed with . . . unalienable rights [that include] . . . Liberty and the pursuit of Happiness."[151] Despite this

149. A number of books have been written to address the history of racial subordination. *See, e.g.*, WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968); JOHN H. FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (6th ed. 1988); IRVING J. SLOAN, THE BLACKS IN AMERICA 1492-1971: A CHRONOLOGY & FACT BOOK (1977); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

150. Captaine John Smith, *The Generall Historie of Virginia, New England and the Summer Isles, Vol. I*, 246-47 (Glasgow, James MacLehose & Sons 1907), *reprinted in* CIVIL RIGHTS AND AFRICAN AMERICANS: A DOCUMENTARY HISTORY 4 (Albert P. Blaustein & Robert L. Zangrando eds., 1991). Scholars have been unable to agree on whether the first 20 Africans were slaves or indentured servants. The legal status of blacks in Virginia from 1619-1660 was also unclear. There is, however, general agreement that they were presumed to be "less than" caucasians and thus were subject to discriminatory treatment. For a brief discussion of this treatment in Virginia, see Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1, 13-18 (1993); *see also* KULL, *supra* note 31, at 1-6.

151. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

egalitarian language, the document protected slavery implicitly. It was not considered contradictory to write such words, yet accept the institution of slavery, because of the almost universal belief in the "less than" nature of black slaves.[152] The implicit protection of slavery and concomitant recognition of black's subordinate status found in the Declaration of Independence was explicitly written into the United States Constitution in 1787.[153] For example, the Constitution treated slaves as three-fifths of a person for purposes of apportioning representatives and taxes among the various states;[154] forbade Congress from eliminating the slave trade until at least 1808;[155] and included a fugitive slave clause requiring that when a slave escaped to another state he was to be returned on the claim of his master.[156]

The best example of the Supreme Court's explicit recognition of the subordinate status and nature of blacks during the antebellum period was Chief Justice Taney's (in)famous opinion in *Dred Scott v. Sanford*.[157] Dred Scott had been taken by his master from the slaveholding state of Missouri into the state of Illinois and the Wisconsin Territory. Slavery was prohibited by state law in Illinois and had been prohibited by Congress in the Wisconsin Territory.[158] After his owner's death, Scott sued the heirs to obtain his freedom. He claimed that the time he resided in a free state and the Wisconsin Territory had effectively worked to emancipate him. When the Missouri Supreme Court rejected his claim he turned to the federal court, invoking diversity of citizenship as the basis for federal jurisdiction.[159] Chief Justice Taney's opinion concluded that people of African descent were not considered citizens within the definition of the Constitution. Thus, Scott did not possess the requisite qualifications to gain access to the federal courts. In interpreting the Founding Father's intent, Taney noted the following:

> [Blacks] had for more than a century before [the Declaration of Independence] been regarded as beings of

152. THE FEDERALIST NO. 54, at 336-41 (James Madison) (The New American Library ed., 1961).

153. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 389 (1978) (Marshall, J., dissenting).

154. U.S. CONST. art. I, § 2.

155. U.S. CONST. art. I, § 9.

156. U.S. CONST. art. IV, § 2.

157. 60 U.S. (19 How.) 393 (1857).

158. *Id.* at 487.

159. Dred Scott sued as a Missouri citizen against his master who was a resident of New York.

> an inferior order, altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . .[160]

Taney merely based his decision on what was generally understood at the time, that blacks were not the equal of whites. Taney went on to state in this opinion that blacks had been stigmatized with "deep and enduring marks of inferiority and degradation."[161] For Taney's opinion in *Dred Scott* and the American society for which it was crafted, this inequality justified relegating blacks to the position of an inferior racial caste. Slavery was an effective way in which the inequality of African-Americans could be managed.[162]

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160. *Id.* at 407.

161. *Id.* at 416.

162. There was general agreement, both in the North and the South, about the inferiority of blacks. While slavery was the way to manage the Negro in the South, in the North his inferiority was managed through segregation.

Segregation, in complete and fully developed form, grew up contemporaneously with slavery, but it did so in the North, not the South. Although blacks were generally not bought and sold in the North, their freedom was circumscribed in many ways. Blacks found themselves systematically separated from whites on railway cars, omnibuses, stagecoaches and steamboats. When permitted to attend, they sat in secluded and remote corners of theaters and lecture halls. They could not enter most hotels, restaurants, and resorts, except of course as servants. They prayed in "negro pews" in white churches, and if they were to partake of the Eucharist, it was after the whites had been served their bread and wine. Blacks were often segregated in schools, punished in separate prisons, nursed in separate hospitals and buried in separate cemeteries.

By custom and law, Negroes were excluded from jury service throughout the North. Indiana, Illinois and Oregon all incorporated constitutional provisions restricting the admission of Negroes into their borders. In 1860, only 6% of the northern Negroes lived in the five states—Massachusetts, New Hampshire, Vermont, Maine and Rhode Island—that allowed them to vote.

Abraham Lincoln also knew the feeling of the great masses of white people in the North about blacks. In 1858, he stated the following:

> I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of white and black races—that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people, and I will say in addition to this that there is a physical difference between the black and white races which I believe will for ever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior

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In December of 1865, only eight months after Robert E. Lee surrendered to General Grant at the courthouse in Appomattox, the Thirteenth Amendment was formerly ratified and chattel slavery was constitutionally abolished. The abolition of slavery, however, did not imply that the freedmen should be granted rights co-extensive with those of whites. The passage of the Fourteenth Amendment bestowed upon blacks the status of citizenship in the United States and the State where they resided, prohibited States from abridging their privileges or immunities as citizens of the United States, and granted them the equal protection of the laws. From the wording of the Fourteenth Amendment, however, it was clear that whatever it granted, it did not grant blacks the right to vote.[163] Hence, equal protection did not mean that blacks were in all instances to be given the same rights as whites. It took the passage of the Fifteenth Amendment to constitutionalize the prohibition against discrimination in voting based on race, color, or previous condition of servitude.[164]

The concept of equal rights in the view of the post-Civil War United States was not interpreted by the Supreme Court in the latter decades of the 19th century to mean equality in the way it is understood within the individualist framework today. As pointed out by Professor Hovenkamp, post-Civil War America distinguished civil and political equality from social equality.[165] To have political and civil equality was to have the same basic human rights against the state that the white person possessed. These rights included the right to own property, to vote, to plead in court, and to share equally in the costs and benefits of government.[166] Social equality was a right asserted not against the state, but against one's fellow citizens. According to the thinking of the time, there was an important distinction between a black person who wanted to serve on a jury and one who wanted to attend an integrated school.[167] Voting only required that government

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> and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.

C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 21 (3d rev. ed. 1974). For a discussion of the conditions of blacks north of the Mason-Dixon line, see generally LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1961).

163. U.S. CONST. amend. XIV.

164. For a discussion of the political situation that spurred Congress to push for enfranchisement of the freedmen, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 239-80 (1988).

165. Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624.

166. *Id.* at 648.

167. The same Congress that voted for the Fourteenth Amendment also established

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recognize the right of the person to do so, but attending an integrated school presumably required that the black person be able to impose his desires on a white person. Hence, social rights were understood as being asserted at the expense of someone else and not just the government.

It was with the understanding that social rights could be distinguished from political rights that the Supreme Court in 1879 was able to strike down a law that restricted jury duty to white males.[168] And yet, four years later, the Court struck down certain provisions of the Civil Rights Act of 1875 that entitled all persons, especially blacks, to the full and equal enjoyment of public places of amusement including: accommodations, advantages, facilities and privileges of inns, public conveyance on land or water, and theaters.[169] The former case was understood by the Court to be about civil or political rights, because the issues in the case involved only assertion of rights against the state. In the latter case, however, the Court felt that it was addressing a statute that required private individuals to recognize the rights of blacks. The Court viewed the provisions of the Civil Rights Act of 1875 as infringing upon social rights of those business owners.

The pre-eminent case of the segregation era, *Plessy v. Ferguson*,[170] legitimated the doctrine of "separate but equal." Justice Brown's opinion for the Court referred also to the distinction between social rights and civil and political rights. The Court was presented with a challenge to a statute that could clearly be seen as motivated by a desire to assert the superiority of whites and the inferiority of blacks.[171] But, the Court specifically

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segregated schools in the District of Columbia.

168. Strauder v. West Virginia, 100 U.S. 303 (1879).

169. The Civil Rights Cases, 109 U.S. 3 (1883).

170. 163 U.S. 537 (1896).

171. Justice Harlan makes this point in his dissent. *Id.* at 552-64 (Harlan, J., dissenting). The Court's opinion in *Plessy* was in tune with the times. Politics and public opinion had turned against the attempts at equality fostered by the Reconstruction Amendments. Alabama and Mississippi had already moved to disenfranchise blacks. Congress, in 1891, had defeated a bill that would have enlarged federal protection of blacks seeking to vote in federal elections, and three years after that it repealed virtually all the Reconstruction statutory projections for the voting rights of blacks. Furthermore, the *Plessy* case did not provoke the media reaction the way the Court's decisions in the *Civil Rights Cases* thirteen years earlier had. *See* WOODWARD, *supra* note 162, at 69-74; *see also* Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17 (1984) (examining federal lower courts' treatment of the issue of separate but equal before *Plessy* and concluding from the lower cases that the Court's opinion in *Plessy* was very predictable and obvious). The case was not even mentioned in many legal publications

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rejected the notion that the Fourteenth Amendment was intended to prohibit social distinctions based on race: "[T]he object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color or to enforce social, as distinguished from political equality."[172] The Court further articulated that "if the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[173] As C. Vann Woodward pointed out, the rationale of the Court's opinion in *Plessy* was based on the notion that railroad seating was in the domain of social relations as opposed to political or civil rights.[174] In effect, the Court could recognize both political and civil equality and, at the same time, the social inferiority of African-Americans.

Acceptance of the notion of African-Americans' social inferiority was evident three years after *Plessy* when the Supreme Court decided the case of *Cummings v. Richmond County Board of Education*.[175] Even though the facts of the *Cummings* case were somewhat unusual and the arguments made by the plaintiffs were mishandled, *Cummings* came to stand for the proposition that equality was not absolute.[176] What the Court did in

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and the decision was not reported in either of the United States Supreme Court Reports. ALEXANDER M. BICKEL & BENNO C. SCHMIDT, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21, at 753 (1984).

172. *Plessy*, 163 U.S. at 543.

173. *Id.* at 552-53.

174. WOODWARD, *supra* note 162, at 155.

175. 175 U.S. 528 (1899).

176. The Richmond County Board of Education had maintained two public high schools—one for black children charging $10 per year tuition and one for white girls charging $15 per year tuition. *Id.* at 531-32. There was a private high school for white boys that charged $15 per year. *Id.* at 531. In addition, there were three other private sectarian schools that would accept black children. *Id.* at 533. When a shortage of space developed for black children in primary schools, the school board decided to convert the black high school into four elementary schools. This deprived 60 black high school students of an education, but provided space for 300 primary school students. *Id.* at 533. The black plaintiffs alleged a violation of the Equal Protection Clause. They sought to prevent the board of education from collecting any taxes to support the high schools operated for the exclusive benefit of the white population and to enjoin the board from using any funds or property, then held by it or thereafter to come into its hands, for supporting such high schools. *Id.* at 529-30.

In a unanimous opinion authored by Justice Harlan, the Court concluded that the reason for closing the black high school was to provide educational opportunities for some 300 primary school students. *Id.* at 544. The Court rejected the notion that there was any

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Cummings was to sanction a situation where Richmond County had decided to operate a high school for white girls while providing funding for a high school for white boys without providing *any* public high school facilities or funding for blacks. The Supreme Court's opinion in *Berea College v. Kentucky*[177] and *Gong Lum v. Rice*[178] went on to seal the Court's recognition of segregation and its concomitant acceptance of the concept that in the area of education, African-Americans were "less than" whites for purposes of applying the Equal Protection Clause.

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desire or purpose on the part of the board to discriminate against any of the colored school children of the county on account of their race. *Id.* Justice Harlan also indicated that the relief sought by the black plaintiffs would impair the efficiency of the high school provided for white children or compel the board to close it. *Id.* at 545. This result would take from the white children an educational privilege that had been granted to them, without providing any benefit for the black children. The Court concluded by noting that under the circumstances disclosed, it could not say that this action by the state was a denial of the equal protection of the laws. *Id.* While all admit that the benefits and burdens of the public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states. *Id.*

177. 211 U.S. 45 (1908). This case involved the criminal conviction of an incorporated college that admitted both whites and African-Americans for instruction in violation of state law which prohibited a corporation from instructing both races at the same institution. *Id.* at 46. The issue was whether this statute violated the Federal Constitution. *Id.* at 53. The Court found the statute valid and reasoned that it was within the state's power to create a corporation and thus the state could limit the activities of the corporation. *Id.* at 58.

178. 275 U.S. 78 (1927). This was the Court's other major education opinion of the segregation era. Martha Lum, a nine year old girl, was denied admission into the local school for whites because of her Chinese ancestry. When the Supreme Court of Mississippi heard this case it directed its attention towards the proper construction of a provision in the state's constitution which provided that "[s]eparate schools shall be maintained for the children of the white and colored races." Rice v. Gong Lum, 104 So. 105 (Miss. 1925). The Mississippi Supreme Court concluded that this provision had divided educable children into those of pure white or caucasian race and those of colored races of brown, yellow and black. Therefore, Martha Lum could not insist on being classified as white. *Id.* Since the Legislature was not compelled to provide separate schools for each of the colored races, all were given the benefit of a unified colored school. *Id.* The Mississippi Supreme Court, therefore, denied Martha Lum admission to the white school. *Id.*

The Supreme Court noted that the ability of the state to segregate had been decided many times. *Gong Lum*, 275 U.S. at 86. Though the issue had generally arisen in the establishment of separate schools between white and black pupils, the Court did not think that the question was any different between white and yellow pupils. *Id.* at 87. Accordingly, the Court upheld the decision to prevent Martha Lum from being admitted to the white school.

2. *The traditional framework after* Brown v. Board of Education

Ironically, the modern traditional framework can be traced to the very opinion that most would associate with its demise, *Brown v. Board of Education*.[179] I have already discussed the individualist framework's interpretation of *Brown I*.[180] To elucidate the traditional framework's interpretation of *Brown I*, it is necessary to read it in conjunction with *Green v. New Kent County*.[181] The question of whether more than non-discrimination measures were required to discharge the burden placed on school systems by *Brown I* and *Brown II* was left open until the Court's 1968 opinion in *Green*. In *Green*, the Court stated explicitly that the obligation placed on public school systems in *Brown II* to achieve a system for determining admission on a non-racial basis required school systems to consider race and achieve a certain amount of racial balancing.[182] Desegregation before *Green* could be seen as adopting race-neutral attendance measures such as freedom of choice. After *Green*, however, desegregation required that schools take account of their students' race in order to achieve a balance.[183] In striking down the "freedom of choice"

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179. 347 U.S. 483 (1954).

180. *See supra* notes 38-44 and accompanying text.

181. 391 U.S. 430 (1968).

182. As Justice Brennan's opinion for the Court in *Green* stated in its opening,

> [T]he question for decision is whether, under all the circumstances here, respondent School Board's adoption of a 'freedom-of-choice' plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public school on a nonracial basis."

Id. at 432; *see also* Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955).

183. There is traditionally an effort to harmonize the integrationist tradition with the liberal tradition. As the argument goes, if everyone treats everyone else as an individual then color simply becomes a description of a purely physical attribute. As a result, since people will not distinguish one another based on color, integration will naturally follow. The reason we are not at that point in our society today is because government for a long time has made racial classification an important determinant of rights and responsibilities. As a result, for at least an interim period of time, the government should take account of race in order to reach that goal. For a good example of these arguments, see Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 741-49 (1986). *See also* Dworkin, *supra* note 26, at 175-89.

Given the persistence of race consciousness in our society, it is clear that in the 1990s we have not reached the place where race does not matter. Anyone who accepts this argument must be prepared to override individual choices for a very long time, without any demonstrable evidence that we will ever evolve beyond this period of

(*continued*)

plan, the Court placed upon school boards the obligation to achieve racial balancing now.[184] The Court rejected the argument of the New Kent County School Board that the Fourteenth Amendment did not require compulsory integration.[185]

Within the individualist framework, the Court might be able to justify taking account of the race of black children by arguing that all of them, including those who had yet to attend *de jure* segregated schools, were individual victims of intentional racial discrimination. However, the rights of white students were also affected by school desegregation remedies. Since these innocent white students, some as young as age 6, could not be said to have inflicted harm upon the black students, it can be cogently asserted that school desegregation rested upon assumptions about the social world that differed from those embedded in the individualist framework.[186]

The Court's articulated rationale in *Green* for placing the obligation on school boards to achieve racial balancing was that "the constitutional rights of Negro school children articulated in *Brown I* required the desegregation of public schools."[187] To find the rationale articulated by the Supreme Court for court ordered school desegregation, we must do as the Court commanded in *Green* and journey back to *Brown I*.

Before going back to *Brown I*, however, I want to emphasize that over 40 years have elapsed since the Supreme Court rendered this opinion on that famous spring day in 1954. At the time the Court delivered that opinion, people of African descent were called Negroes out of respect, and

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transition.

184. *Green*, 391 U.S. at 441. Under the "freedom-of-choice" plan, no whites had enrolled in the black school, and only 15% of blacks had enrolled in the white school. *Id.* The Court noted that "transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Id.* at 436. Prior to the *Green* opinion, freedom of choice plans were considered sufficient to meet the constitutional obligation imposed on school systems by *Brown II*. One of the provisions included in the Civil Rights Act of 1964 prohibited federal financial assistance from being given to programs or activities engaged in discrimination. The Department of Health, Education and Welfare issued regulations addressing racial discrimination in federally aided school systems as directed by 42 U.S.C. § 2000d-1 (1988), and in the statement of policies or guidelines, the department's Office of Education established standards of eligibility for federal funds of school systems in the process of desegregation. 45 CFR §§ 80.1-80.13, 181.1-181.76 (1976). "Freedom of choice" plans were seen as acceptable under these regulations. *See* 391 U.S. at 433-34 & n.2; *see also* GRAGLIA, *supra* note 44, at 53.

185. *Green*, 391 U.S. at 437.

186. Mark Yudof, *Nondiscrimination and Beyond in School Desegregation, in* SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE 97, 106 (1980).

187. 391 U.S. at 438.

they were called nigger, darkie, and even black as an insult. America had not yet experienced the Civil Rights Movement, the Black Conscious Movement or the Afrocentric Movement. Segregation and conscious racial discrimination were not only the explicit law of the land in many places but also the standard American business, educational, political, and social practice. To discriminate based on race in stores, restaurants, hotels, motels, and other places of entertainment was generally accepted as a fact of life. Negroes seldom occupied positions in American businesses and corporations above the most menial levels. For the most part, lower level management positions were even unobtainable. What in the 1990s we refer to as the "glass ceiling" was a firmly implanted, outright concrete barrier forty years ago. In 1954, only a handful of Negroes attended prestigious colleges and universities in this country and almost none of them taught there. A colored man had not been elected mayor of a major U.S. city in the twentieth century, and there were only four Negroes serving in Congress, none having been elected from the South since 1900. In 1954, many places in the country had separate facilities for whites and coloreds, including: water fountains, waiting rooms, transportation facilities, restrooms, schools, hospitals, and cemeteries. The Court's opinion in *Brown I* preceded the Civil Rights Act of 1964, the single most sweeping piece of civil rights legislation in the country's history, by ten years. It also preceded, by eleven years, the Voting Rights Act of 1965 which effectively secured the right to vote for most Negroes living in the South. This is where the majority of Negroes lived at the time and most had been disenfranchised since the 1890s.

In 1954, the collective history of race relations in North America, which had spanned almost 335 years, was primarily one of slavery and, after the Reconstruction period following the Civil War, one of legally enforced and sanctioned segregation. It was a history of almost uninterrupted use of race to classify people of African descent for purposes of subjugation.

According to the Court's opinion in *Brown I*, the harm of *de jure* segregation was not limited to violations of governmental neutrality but included also the tangible effects upon blacks. In one of the most quoted phrases from *Brown I*,[188] the Court stated that "[t]o separate [African-American youth] from others of similar age and qualifications solely

188. Professor Derrick Bell has noted that proponents of integration quoted this phrase over and over to justify their belief that integration provides the proper route to equality. Derrick Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281, 285 (1981).

because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[189] The Court went on to quote approvingly from the district court in Kansas:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[190]

Before continuing, we must first understand the breadth of the Court's conclusions about the harm of segregation. Since the Court indicated that the harms suffered were never likely to be reversed, the harms presumably also affected those blacks who had attended segregated schools prior to 1954. As a result, it was not just black school children who stood to be psychologically damaged by segregation, but also black adults, who as products of such schooling were already so damaged. In an opinion which today may come close to group slander, the Supreme Court explicitly states that Negroes have had their educational and mental development stunted by segregation. Despite the presence of sociological testimony concerning the harm suffered by whites as a result of segregation, the Supreme Court

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189. Brown v. Board of Educ., 347 U.S. 483, 494 (1954). The social science evidence cited by the Court in footnote 11 was specifically intended to prove that segregation produced a psychological harm to African-Americans. Doubt, however, has always been expressed as to whether the social science evidence cited in *Brown I* actually influenced the Justices. *See* Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-58 & n.16 (1955); RALPH ROSS & ERNST VAN DEN HAAG, THE FABRIC OF SOCIETY 165-66 (1957). In addition, the research by psychologists purporting to show that African-Americans in public schools had lower self-esteem has been the subject of criticism recently by WILLIAM CROSS, SHADES OF BLACK (1990). He argues that in the 1950s psychologists assumed that racial group preference was closely correlated with self-esteem. *Id.* at 51-52. As psychologists developed methods of testing self-esteem directly, however, they discovered that African-American self-esteem tests out as high or higher than that of whites.

190. *Brown I*, 347 U.S. at 494 (quoting Brown v. Board of Educ., 98 F. Supp. 797, 798 (D. Kan. 1951)).

based its opinion on the fact that only African-Americans were damaged by segregation.[191] The Court implies, therefore, that the psychological and mental development of whites was unaffected by *de jure* segregation.

Let me first note that there is an important, critical distinction between basing segregation upon a false premise that African-Americans are not the equals of whites and believing that segregation actually distorted the cognitive, psychological, and emotional development of blacks. According to the former, the structure of education was based upon the false premise. According to the latter, because of segregation, blacks were actually made inferior to whites. Under the former, racism was irrational because the premise it was based upon was false. According to the latter, racism has a rational basis, but the inferiority of blacks is presumed, at least theoretically, to be curable. According to the former, since both blacks and whites were being indoctrinated with the false premise of black inferiority, both were victimized by *de jure* segregation though in different ways. According to the latter, the harm of *de jure* segregation effected only blacks. According to the former, desegregation as a remedy for segregation would have benefited both blacks and whites. According to the latter version, and the Supreme Court, inter-racial exposure of Caucasians to African-Americans was not beneficial to white students. In effect, the Supreme Court accepts the idea that blacks are inferior to whites but simply changes how that inferiority should be treated. *Desegregation was needed because of—not in spite of—the fact that the Supreme Court thought whites to be superior to blacks.*

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191. *Effects of Segregation and the Consequences of Desegregation: A Social Science Statement, reprinted in* 37 MINN. L. REV. 427, 430-31 (1953).

> With reference to the impact of segregation and its concomitants on children of the majority group, the report indicates that the effects are somewhat more obscure. Those children who learn the prejudices of our society are also being taught to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual personal ability and achievement. The culture permits and, at times, encourages them to direct their feelings of hostility and aggression against whole groups of people the members of which are perceived as weaker than themselves. They often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing essential injustice of their unrealistic fears and hatreds of the minority groups.

Id. at 431.

I do not wish to be perceived as voicing the proposition that the Supreme Court was wrong in striking down *de jure* segregation in 1954. It seems to me that only a fool would take such an outlandish position. As an African-American law professor, it is obvious that had the Court not struck down *de jure* segregation in *Brown I*, I would not be in the position to write this article. I extol the valor that the Court exhibited in breathing life into the moral imperative of equality enshrined in America's most important legal documents. As a decision to strike down *de jure* segregation, *Brown I* should be looked upon and revered as a fundamental effort by the Supreme Court that sparked a historic effort by American society to attempt to break with its racially oppressive past. Without question, the opinion helped to open doors for African-Americans that prior to it were permanently barred. Certainly there were extra-legal implications for an opinion like *Brown I,* which made it important for the Court to reach unanimity. Additionally, considerations about the inflammatory nature of the subject matter may have caused the Court quite correctly to write the opinion the way that it did. I am, therefore, willing to concede that the Court delivered the best opinion possible for the American society as it existed in 1954.

Now, however, it is forty years after the Court's opinion in *Brown I.* The America of today is not the one that existed then. Many of the people who were called Negroes as a term of respect in 1954 would be offended to be called a Negro today. To call such a person "Black" is not an insult, but a sign of respect, and in most circles, the term used is "African-American." This term makes an explicit link between, and shows respect for, both past and present homelands. This America is not before the Civil Rights Movement and the Black Conscious Movement, but twenty-five years after it. Americans no longer live with white-only and colored-only signs etched above water fountains, waiting rooms, transportation facilities, restrooms, schools, hospitals, and cemeteries. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 have been the law for over thirty years. Even in contexts where it is not against the law to consciously use race to discriminate, the general American ethos makes it clear that it is at least considered wrong or in bad taste to discriminate against blacks solely on the basis of race. In brief, Americans live today in a society that has been altered by *Brown I.* American society is considerably different forty years later because of that opinion, and many of those changes have been monumental.

In this article, I am addressing problems which the judges and the NAACP may not have anticipated in 1954. Even if they were anticipated, they were powerless to do anything about them. What I am doing,

therefore, is looking at how a 1954 opinion is functioning in the context of a 1995 society. A society that has been shaped and influenced by that very opinion.

Twenty-three years after *Brown I*, the Court once again used the traditional framework in approving the *Milliken II* remedies. In *Milliken v. Bradley*[192] (*Milliken II*) the Court affirmed a district court order approving remedial educational programs as part of the remedy for the *de jure* segregation of the Detroit Public School System.[193] The order also required the state of Michigan to pay half the costs of the programs. The educational programs proposed by the Detroit School Board and approved by the district court fell into four categories. The first was remedial reading programs. The second was in-service training for teachers and administrators. The purpose of the in-service training program was "to train professional and instructional personnel to cope with the desegregation process" in order "to ensure that all students in a desegregated system would be treated equally by teachers and administrators."[194] The third educational program related to revising testing procedures. The testing program was adopted because the district court found that black children were "especially affected by biased testing procedures."[195] The fourth educational program was counseling and career guidance. Counselors were included in the plan to address the psychological pressures that undergoing desegregation would place on Detroit's students.[196]

All of the educational components, except the reading program, could have been justified within the individualist framework's notion of eliminating the bias in the school system that resulted from the violation of governmental neutrality. In justifying its decision, however, the Court stated that the African-American "[c]hildren who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their

192. 433 U.S. 267 (1977).

193. *Id.* at 287. The district court determined that the State of Michigan was just as responsible for segregation of Detroit's public schools as the school system. Consequently, the district court assigned responsibility for half of the cost of the educational components of the desegregation plan to the Detroit Public School System and the other half to the State of Michigan. *Id.* at 277. This case reached the Court, because the State of Michigan objected to being made partially responsible for funding this part of the remedy. *Id.*

194. *Id.* at 275.

195. *Id.* at 276.

196. *Id.*

cultural isolation . . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger . . . ."[197] The implication of the Court's statements is that the racial isolation forced upon these children somehow distorted and retarded their development. The root condition caused by their racial isolation had to be treated directly. While the Court noted that the educational problems of African-American children are not peculiar to their race, it clearly suggested that their problems were the result of racial isolation.[198]

According to the Court, the *Milliken II* remedies are intended to rectify the problems faced by African-American school children. Segregation isolated Caucasians from blacks also, but the presumption is that this did not harm whites. Once again, the traditional framework was being used to distinguish African-Americans from Caucasians in order to justify public educational assistance for black students. Like the ordering of mandatory racial balancing, the basis for this opinion is also the assumption that there are knowing individuals, Caucasians, and people who are members of a substandard group, African-Americans.

C. *The Structure of and Arguments for Public Educational Programs That Assist African-American Males*

The traditional framework does not provide for considering the group interests of black males separately from black females. To use the traditional framework as the means for structuring public educational programs that will assist African-American males requires that those programs also include provisions for African-American females. This point is illustrated best by the only court case that has addressed an equal protection challenge with respect to an attempt to set up African-American male schools.

In *Garrett v. Board of Education,*[199] a federal district court addressed the legality of African-American male academies which the City of Detroit's Board of Education wanted to establish. The board had approved the establishment of three male academies in order to respond to the plight of African-American males. These academies were to open in the fall of 1991 and were to serve approximately 250 boys from preschool through

197. *Id.* at 287.
198. *Id.*
199. 775 F. Supp. 1004 (E.D. Mich. 1991).

the fifth grade. The board intended to expand the program and phase in programs for grades six through eight over the next few years.[200]

The plaintiffs alleged that the attempt by the board to open these male academies violated, among other provisions, the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs sought a temporary restraining order to prevent the opening of the male academies and a preliminary injunction enjoining the defendant from excluding girls from the academies. The plaintiffs were represented in the litigation by the ACLU of Michigan and the NOW Legal Defense and Education Fund. It can be presumed that these organizations had a lot to do with structuring the litigation in this case. The plaintiffs, presumably, did not advance the potential issue of race discrimination because that would have defeated the ability to get females into the academies. The district court handled this issue as presented and dealt only with the issue of gender discrimination. As a consequence, the court applied the presumably less demanding middle level scrutiny test rather than applying the strict scrutiny test applicable for race discrimination. According to the district court, exclusion of females from publicly-funded schools violates the Equal Protection Clause, unless the defendant can show that the sex-based classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.[201]

The plaintiffs made two sets of arguments regarding the unconstitutionality of the male academies. First, they argued that the special curriculum proposed for the academies suggested that there was a dichotomy between the roles and responsibilities of boys and girls. Thus, the Detroit public schools were arguing that the socialization of girls should differ from that of boys. This argument in effect asserts that government's establishment of male academics violates the constraint of neutrality embedded within the individualist framework. In order to justify the establishment of male-only academics, government has to treat people not as individuals, but rather as either males or females.

Second, the plaintiffs argued that the black female students were just as bad off as the boys. This argument is based upon the traditional framework which sees all blacks—male and female—as members of a

200. Once these were phased in there would be places for a total of 600 boys who could receive gender segregated education. Richard Cummings, *All-Male Black Schools: Equal Protection, the New Separatism and* Brown v. Board of Education, 20 HASTINGS CONST. L.Q. 725, 743 (1993).

201. Garrett v. Board of Educ., 775 F. Supp. 1004, 1006 (E.D. Mich. 1991) (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

substandard group. Hence, exclusion of the girls from the academies was not justified. The district court, in summing up the second argument, stated:

> [P]laintiffs conclude that the male academies improperly use gender as a 'proxy for other, more germane bases of classification,' . . . in this instance, for 'at risk' students. Specifically, the gender specific data presented in defense of the Academies ignores the fact that all children in the Detroit public schools face significant obstacles to success. In fact, in its resolution establishing the Academies, the Board acknowledged the "equally urgent and unique crisis facing . . . female students." *Urban girls drop out of school, suffer loss of self esteem and become involved in criminal activity. Ignoring the plight of urban females institutionalizes inequality and perpetuates the myth that females are doing well in the current system.* Accordingly, plaintiffs contend there is no adequate justification for the Academies' exclusive focus on boys.[202]

The district court agreed with the plaintiff's second argument. The board had argued that the academies were needed to address the crisis facing African-American males as manifested by their high homicide, unemployment, and drop-out rates. The district court agreed that the statistics regarding the conditions of African-Americans males underscored a compelling need and, thereby, satisfied the first prong of the middle level scrutiny test.[203] Where the district court faulted the board was on its inability to meet the second prong of the test. The degree of importance does not eliminate the burden of showing that the exclusion of girls was substantially related to the important governmental objective. The district court went on to hold that the defendant failed to demonstrate how the exclusion of females from the academies was necessary to combat unemployment, dropout, and homicide rates among urban males.[204] The district court agreed also with the arguments of the plaintiffs that the school system was failing females as well.[205]

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202. *Id.* at 1007 (emphasis added) (citations omitted).
203. *Id.* at 1007-08.
204. *Id.* at 1008.
205. *Id.*

IV. CONTRASTING THE LEGAL ARGUMENTS IN THE TWO FRAMEWORKS

Given the historic analyses that have been applied to the issue of race or gender and education, it is unlikely that public educational programs aimed at improving the plight of black males can be limited only to black males. Neither the individualist nor the traditional frameworks allow for addressing only the problems of black males. Programs to assist black males must be part of a larger program that either under the individualist framework, assists all students or under the traditional framework, assists both male and female black students. Since each framework rests upon different conceptions of the social world and where race and gender fit into it, the acceptable legal arguments under either framework must be structured in different ways.

The workings of these two frameworks and their implications for legal analysis can be illustrated by contrasting the VMI and The Citadel cases with *Garrett*. Since all of these cases addressed the same issue of gender-segregated education, where the option to apply for admission was provided only to males, they could have been analyzed in the same manner. The subtext of *Garrett*, however, was gender-segregated education for African-American males. The Fourth Circuit in the VMI case, the district court in the Citadel case, and the district court in *Garrett* applied the same middle level scrutiny test appropriate for equal protection challenges to gender classifications. Each of the three courts concluded that providing the benefit of gender-segregated education to only males violated the Equal Protection Clause, because the benefit was not substantially related to an important governmental interest. Where the constitutional analysis differed among these cases was on what constituted the substantial governmental interest. The legal analysis in *United States v. Virginia* and *Shannon v. Faulkner* was conducted within the individualist framework. As a result, the substantial governmental interest was diversity in education. As a consequence, the structure of the legal arguments led proponents of VMI and The Citadel to focus exclusively on the benefits of gender-segregated education as a pedagogical alternative to coeducational learning.

In contrast, the district court in Detroit analyzed this issue within the traditional framework. It concluded that the substantial governmental interest justifying the establishment of the male academies in Detroit was the crisis condition of African-American males. The legal justifications given for these schools was that black males are in a crisis situation because of their homicide rates (tendencies toward violence), their unemployment rates (tendencies toward laziness), and their drop out rates (lack of

intelligence). Hence, the legal structure of this issue required the proponents of the male academies to focus on the deplorable condition of African-American males both inside and outside educational institutions. In fact, the worse the condition of African-American males could be made to appear, the better the chances of establishing the substantial interest that would satisfy the first prong of the intermediate test.

These two legal frameworks have different implications for the black male students who might attend programs that are justified within the separate frameworks. Since the individualist framework abhors confining people based upon characteristics they did not choose, the racial and gender issues are subordinate to the educational justifications. The arguments for gender-segregated education within the individualist framework are directed towards asserting that, for pedagogical reasons, all students could receive a better education. The implication is that students trained in gender-segregated programs are actually better trained than those persons from coeducational institutions. In contrast, the justification for gender-segregated public educational programs within the traditional framework is remedial. The purpose of such education is to provide special assistance to a group of people who are failing not only in the school system but in society at large. The implication for these students is not the positive one that exists under the individualist framework. Under the traditional framework, the implication is that the students are in need of special remedial assistance.

Finally, the implications of structuring programs that assist black males within these two frameworks have different messages for black females as well. Within the individualist framework, no special attention is brought to their race or gender. Within the traditional framework, attention is brought to them but in a negative manner. Within this framework, the racial condition of blacks as a substandard group is what justifies the remedial program. As a result, it is the crisis condition of black women that justifies the extension of gender education to them.

CONCLUSION

When we engage in legal discourse we are engaged in a process of conceptualizing and articulating given phenomena in a way that respects the various patterns of understandings or cognitive frameworks used by the legal system. These patterns of understanding, or cognitive frameworks, are the result of historically developed ways of understanding various legal phenomena. They are also self-perpetuating and self-validating because they dictate the kinds of arguments that are persuasive for resolving legal disputes. Historically, cognitive frameworks are brought to a current legal

problem under the guise of stare decisis. Therefore, the press of prior legal history is always exerting a molding influence on the structure of any current legal dispute.

The point of this article is to demonstrate the "crisis" of the current regime of legal conceptualization for developing public educational programs to respond to the "crisis" facing African-American males. Proponents of such programs have two alternative frameworks in which to structure and legally argue for their legitimacy. Each of these cognitive frameworks, the individualist framework and the traditional framework, is the product of prior constitutional developments. Since they have incommensurable views of the social world and African-Americans' place within it, they provide alternative ways of structuring and arguing for programs that can benefit African-American males.

The basic organizing premise of the individualist framework is a conception of society as a collection of knowing individuals. The individualist framework, however, will not allow the establishment of programs that just benefit African-American males. Such programs must comply with the requirement of governmental neutrality embedded in this framework. Within this framework, proponents are forced to structure the programs and arguments in such a way as to deny that they are actually programs for African-American males. These governmental programs must be racially and gender neutral programs. In order to do this, it will necessarily mean that a considerable amount of flexibility will be lost. Racially neutral methods to determine both participants and instructors will no doubt be required. In addition, the rationale for such programs should be based upon sound educational reasons as opposed to political considerations, such as the "crisis" of the condition of African-American males. In this way, the argument can be made consistent with the requirements of governmental neutrality in the individualist framework that the school district is providing the option of gender segregated education for all students. Even if this is done, it is still an uphill argument to convince a court that the liberal framework does apply.

The traditional framework organizes the social world around a different conception. It views the social world as composed of knowing individuals who are generally Caucasian of European descent and members of various substandard groups—which would include blacks. The application of this framework is most likely in school systems where the student body is predominately minority. The traditional framework will not allow the establishment of programs that just benefit African-American males and not African-American females, because both black males and females are seen as in need of remedial assistance.

It is certainly easier to be up-front about racial aspects of gender segregated education in the traditional framework than it is in the individualist framework. The cost of the traditional framework exacted upon African-Americans is, however, extremely high. It converts proponents of programs for African-American males (and now females as well) into their largest defamers.[206] In order to justify programs within this framework, proponents are locked into a structure of legal argumentation that requires that they rationalize the negative stereotypes about African-American males (and females). The better their arguments and statistics demonstrate the deplorable nature of African-American males (and females), the better their chances of at least establishing the compelling or substantial state interest that will justify such programs. Hence, within this framework, proponents are locked into a legal structure where they are called upon to be advocates for the inadequacies of those they wish to help.[207]

There is certainly no guarantee that courts will approve programs that rely on the traditional framework. Being forced into the traditional framework could put proponents of programs for African-American males (and females) into the worst of all possible positions. They could both be working to rationalize negative stereotypes about African-American males (and females) and still not be successful in having the programs upheld against an equal protection challenge.

In short, the crisis condition of legal argumentation for those who answer the secondary normative question is clear. Either they must hide their intentions to engage in race and gender motivated programs, or they must become the biggest critics of the very group they most want to help. Whichever route they choose, it is far from certain that they will be successful.

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206. Professor Derrick Bell makes this point explicit in his discussion about the usual price of racial remedies. *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 647-48 (3rd ed. 1992).

207. Certainly many have understood affirmative action programs in college and university admissions as also products of the pejorative framework. Take for example the argument that Archibald Cox made during oral argument in *Bakke*. "For generations, racial discrimination in the U.S. isolated certain minorities [and] condemned them to inferior education. . . . There is no racially blind method of selection which will enroll today more than a trickle of minority students in the nation's colleges and professions." J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 261(1979).